Supreme Court, U.S.
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No. 98- ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GERALD GIRRES, *et al.*,
Petitioners,

v.

CLARENCE BORMANN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Iowa

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are "right to farm" laws—enacted by all fifty States—facially unconstitutional as a *per se* taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioners, intervenors before the District Court for Kossuth County and intervenors-appellees before the Iowa Supreme Court, are Gerald Girres, Joan Girres, Mike Girres, Norma Jean Thul, Jerald Thilges, Shirley Thilges, Thelma Thilges, Edwin Reding, Ralph Reding, Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke, and Patricia Goecke. The Board of Supervisors for Kossuth County and Joe Rahm, Al Dudding, Laurel Fantz, James Black, and Donald McGregor—in their capacities as members of the Board of Supervisors—were defendants before the District Court and appellees before the Iowa Supreme Court, and are respondents in this Court under S. Ct. Rule 12.6. They supported petitioners' position below.

Respondents Clarence Bormann, Caroline Bormann, Leonard McGuire, and Cecelia McGuire were plaintiffs before the District Court and appellants before the Iowa Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gerald Girres, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Iowa Supreme Court in this case.

OPINIONS BELOW

The opinion of the Iowa Supreme Court is reported at 584 N.W.2d 309 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for Kossuth County is unreported and reproduced at App. 27a. The order of the Board of Supervisors for Kossuth County is unreported and reproduced at App. 63a.

JURISDICTION

The judgment of the Iowa Supreme Court was entered on September 23, 1998. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "nor shall private property be taken for public use without just compensation." The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." The pertinent provisions of Iowa's right to farm law, Iowa Code § 352, are reproduced at App. 65a-71a.

RULE 29.4(c) STATEMENT

Pursuant to S. Ct. Rule 29.4(c), petitioners note that this proceeding calls into question the constitutionality of Iowa Code § 352.11(1)(a), and that neither the State of Iowa nor any agency, officer, or employee thereof is a party. Accordingly, 28 U.S.C. § 2403(b) is applicable and petitioners have served this petition on the Attorney General of Iowa.

INTRODUCTION

Every State in the Union has enacted a "right to farm" law to help preserve agricultural land in the face of suburban sprawl and other pressures on agriculture and agricultural land. Like the Iowa law at issue in this case, those laws typically provide farmers a qualified defense to nuisance actions brought by nearby residents complaining about the normal incidents of today's farm life. In this case the Iowa Supreme Court held that Iowa's right to farm law violated the Takings Clause of the Federal Constitution because it effected an uncompensated taking of the nearby residents' right to bring such a nuisance action. The court reached this conclusion even though the record was devoid of any indication that the nuisance defense had been triggered, and without engaging in the balancing of competing interests that this Court has held is normally required in assessing federal takings claims. Instead, the court struck down the Iowa law on its face as a *per se*

taking—a category this Court has held is restricted to governmental actions that either deprive a landowner of all economic use of property or physically invade the property that has been "taken." The Iowa Supreme Court thus expressly departed from this Court's precedents and held that a government regulation that did not effect a physical invasion or deprive the landowner of all economic use may nonetheless constitute a taking *per se*.

The decision of the Iowa Supreme Court not only conflicts sharply with this Court's takings jurisprudence, but calls into question the constitutionality of right to farm laws in each of the other 49 States. This Court should grant certiorari to confirm that the legislative adjustment of competing land use claims embodied in right to farm laws is not a *per se* violation of the United States Constitution.

STATEMENT OF THE CASE

The American experiment is rooted in no small measure in the agrarian ideal. In 1790 ninety-five percent of the population lived in a rural, agricultural setting. Agriculture was key to the Nation's fledgling economy, and the family farm critical to many citizens' survival. To many—most notably, Thomas Jefferson—farming was thought to be indispensable to cultivating the democratic values and ideals necessary to sustain the new Republic. De Tocqueville called America's agrarian character "one of the first causes of the maintenance of republican institutions in the United States." I *Democracy in America* 290 (Vintage Books ed. 1990). In time, of course, agrarianism gave way to industrialism and a more urban society. but the agrarian ideal remains fixed in our national psyche, and agriculture and the family farm continue to play a vital role in the Nation's economy.

With the decline of agrarianism, federal and state governments have legislated numerous programs aimed at assisting farmers and promoting agricultural activities in this country. In the late 1970s and early 1980s, States began passing "right to farm" laws in response to the

pressures that suburban sprawl and other developments imposed on existing farming operations. These laws—which have been adopted by every State, *see* App. 72a-73a—seek to protect farms from the pressures of a more urbanized society, thereby preserving each State's agricultural base. Though varying in their particulars, right to farm laws typically afford farmers a qualified defense to nuisance actions brought by neighbors who object to the normal incidents of today's farming operations.

Iowa enacted its right to farm law in 1982 pursuant to the State's policy "to provide for the orderly use and development of land and related natural resources in Iowa." Iowa Code § 352.1. The stated purpose of the law is to preserve "the state's finite supply of agricultural land" by allowing "establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas * * * is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state." *Id.* To advance this end, Section 352.11(1)(a) of the law provides that "[a] farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation." [1]

The nuisance defense provided by Section 352.11(1)(a) is, however, not absolute. It applies only to land used for agricultural production, and is not available if: (1) the nuisance results from a farm operation determined to be in violation of a federal or state statute or rule; (2) the nuisance results from the negligent operation of the farm;

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[1] Under the statute, an owner of farmland may submit an application with a county board to have land designated an "agricultural area" subject to the Act. Iowa Code § 352.6. The county board must give notice of an application to form an agricultural area. *Id.* § 352.7. After the agricultural area has been in place for six years, an owner may withdraw land from a designated agricultural area upon notice to the same county board. *Id.* § 352.9.

(3) the injury or damage complained of occurred before the creation of the agricultural area; or (4) the damage complained of was caused by pollution or a change in conditions of the waters of a stream, the "overflowing" of the objecting person's land, or excessive soil erosion onto that person's land. Iowa Code § 352.11(1)(b).

The facts in this case are not in dispute. In January 1995, petitioners, individuals who own 960 acres of land in Kossuth County, Iowa, requested that the Kossuth County Board of Supervisors designate their land as an agricultural area within the meaning of the state law. *Id.* § 352.6. The Board found that the proposed agricultural area met the statutory requirements and was consistent with the purposes set forth by the Iowa General Assembly, and approved petitioners' request. App. 63a. Respondents—petitioners' neighbors—challenged the Board's approval of the agricultural area in Kossuth County District Court. They alleged, among other things, that the Board's action deprived them of property without just compensation under both the Federal and Iowa Constitutions, App. 40a, on the ground that the designation of the land as an agricultural area automatically entitled petitioners to "nuisance immunity," even though respondents presented "neither allegations nor proof of nuisance." App. 6a.

The District Court rejected that contention. It began its analysis by noting that the plaintiffs were mounting "a facial challenge" to the law, and that "[i]t is not alleged that any of the [petitioners] are at this time maintaining a nuisance upon their premises." App. 34a. The court explained that this Court's precedents found a *per se* taking only in cases of physical invasion or when government regulation deprived a landowner of all economically viable uses of property. The court noted that the Iowa right to farm law neither effected a physical invasion of any property, nor deprived neighboring landowners of all uses of their property. As the District Court explained, "[t]he Supreme Court has been markedly disinclined to find a

regulatory taking where only one or two sticks in the 'bundle of rights' that are part and parcel of the ownership of real property have been impaired," and here "the challenged legislation impairs but does not eliminate one of the many 'sticks' in the bundle of rights, and * * * represents the legislature's judgment in adjusting property rights, but does not amount to a taking." App. 46a.

The District Court also reviewed precedents considering whether the establishment of a nuisance could constitute a taking, but concluded that the plaintiffs could not rely on such a theory in a facial challenge. As the court explained, "[w]hether the operation of a farming enterprise in an agricultural area in the future, absent negligence and in conformity with State and Federal environmental regulations could rise, as applied, to a nuisance and a 'taking' under the Fifth Amendment, cannot now be decided." App. 54a. The District Court later denied plaintiffs' request for reconsideration. App. 60a.

The Iowa Supreme Court reversed. That court ruled that the Board's action in creating the agricultural area, thereby permitting petitioners to assert the nuisance defense under Iowa Code § 352.11(1)(a) in the event they were sued for nuisance and none of the statutory exceptions applied, was an unconstitutional *per se* taking under the Fifth Amendment to the United States Constitution and Article I, Section 18 of the Iowa Constitution. The court began its analysis by noting that "the facts are not in dispute" and that the "only question is a legal one." App. 5a. It also recognized that respondents' challenge was "a facial one because [they] have presented neither allegations nor proof of nuisance." App. 5a-6a.

The Iowa Supreme Court noted that two categories of government action require compensation without any inquiry into additional factors: (1) a physical invasion, or (2) regulation that denies all economically beneficial use of the property. App. 14a (citing *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003 (1992)). Respond-

ents conceded that the latter category was inapplicable, so the only issue before the court was whether the Iowa right to farm law was, on its face, a *per se* taking as a physical invasion of respondents' property. App. 14a-15a. The court concluded that it was, relying on precedents from the early twentieth century for the proposition that the authorization of a private nuisance satisfied the physical invasion test. App. 16a-24a. Based on these precedents, the court concluded that a physical taking or touching is not necessary to meet the physical invasion standard for a *per se* taking under *Lucas*. The court then held that the appropriate remedy was to hold "that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force or effect." App. 25a. Because respondents "seek no compensation," the Iowa Supreme Court struck down the law under the Federal Constitution without engaging in any analysis of what "just compensation" would be. App. 26a. The court "recognize[d] that political and economic fallout from our holding will be substantial," but concluded that "the challenged scheme is plainly—we think flagrantly—unconstitutional." *Id.*[2]

REASONS FOR GRANTING THE WRIT

One of the principal considerations governing the exercise of this Court's discretion to grant certiorari is whether a state high court "has decided an important federal question in a way that conflicts with relevant decisions of this

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[2] The Iowa Supreme Court concluded that the right to farm law was unconstitutional under the Fifth Amendment to the Federal Constitution and Article 1, Section 18 of the Iowa Constitution. App. 24a, which also provides that "[p]rivate property shall not be taken for public use without just compensation." Under *Michigan* v. *Long*, 463 U.S. 1032 (1983), the citation of the Iowa Constitution does not constitute an independent state ground precluding review in this Court of the Fifth Amendment ruling. This is particularly true since there is no dispute that the federal and Iowa takings clauses have the same meaning and scope.

Court." S. Ct. Rule 10(c). *See, e.g., Barker* v. *Kansas,* 503 U.S. 594, 597 (1992); *Arizona* v. *Mauro,* 481 U.S. 520, 525 (1987); *Pennsylvania* v. *Goldhammer,* 474 U.S. 28, 28 (1985) (per curiam); *Michigan* v. *Clifford,* 464 U.S. 287, 289 (1984). As we explain below, the decision of the Iowa Supreme Court in this case squarely conflicts with this Court's decisions in at least two fundamental respects. First, the decision conflicts with this Court's precedents on when a facial takings challenge brought pursuant to the Fifth Amendment is appropriate for judicial resolution. Second, and in any event, the decision conflicts with this Court's precedents on when a *per se* taking has been effected under the Fifth Amendment. Certiorari is warranted to resolve each of these conflicts, especially in view of the fact that the Iowa Supreme Court's decision calls into question the constitutionality of right to farm laws found in every State of the Union.

I. THE IOWA SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS ON THE MINIMUM FACTUAL RECORD NECESSARY TO ADJUDICATE A TAKINGS CLAIM.

This Court has "oft-repeated * * * that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 294-295 (1981). *See Rescue Army* v. *Municipal Court,* 331 U.S. 549, 570 n.34 (1947) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable.") (citation omitted); *Alabama State Fed'n of Labor* v. *McAdory,* 325 U.S. 450, 461 (1945) (Court's "considered practice [is] not to decide abstract, hypothetical or contingent questions * * * or to decide any constitutional question in advance of the necessity for its decision * * * or to decide any constitutional question except with reference

to the particular facts to which it is to be applied") (citations omitted). "Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking." *Virginia Surface Mining*, 452 U.S. at 295. The Iowa Supreme Court flagrantly disregarded this fundamental rule of adjudicating federal takings claims, holding the State's right to farm law "unconstitutional and without any force or effect," App. 25a, on a record containing absolutely no indication that the statute had been triggered, or how the statute will operate if and when it is.

In *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), the Court applied this rule in declining to adjudicate a facial takings challenge to a California municipality's rent control ordinance. The ordinance authorized a local official, in assessing the reasonableness of a proposed rent increase, to consider, among other factors, whether the increase imposed an "economic and financial hardship" on the tenant. *Id.* at 4-6. A landlord and landlord association brought suit in state court, contending that the ordinance's "tenant hardship" provision was "facially unconstitutional" under the Fifth and Fourteenth Amendments to the Constitution. *Id.* at 4 (quotation omitted).

The California Supreme Court considered the landlords' claim and concluded that the ordinance did not violate the Fifth Amendment. This Court, however, held that it "would be premature to consider [the landlords' facial challenge] on the present record." *Id.* at 9. The Court explained that, "[a]s things stand, there is simply no evidence that the 'tenant hardship clause' has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance," and that there was "nothing in the Ordinance requiring that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship." *Id.* at 9-10. Emphasizing that this Court has "found it particularly important in takings cases to adhere to our admonition that 'the con-

stitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary,'" *id.* at 10 (quoting *Virginia Surface Mining*, 452 U.S. at 294-295), the Court held that "the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here." *Id.*[3]

Pennell thus establishes that a facial takings challenge should not be entertained where it is not clear from the record whether, when, or how the provision at issue will be applied, or what the precise impact of applying the challenged provision will be on the property rights at issue. *See also Virginia Surface Mining*, 452 U.S. at 296 & n.37 (facial takings challenge was "premature" where "appellees made no showing in the [trial court] that they own tracts of land that are affected by th[e] [challenged] provision"); *cf. Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (finding facial takings claim "ripe" where adjudication of claim did not require Court to address "the extent to which [plaintiffs] are deprived of * * * their particular pieces of property or the extent to which these particular [plaintiffs] are compensated").[4]

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[3] The fact that the landlords had "specifically alleged in their complaint that [their] properties are 'subject to the terms of' the Ordinances" was sufficient to confer Article III *standing* on the landlords to raise their Fifth Amendment claim, but did not create an adequate record to adjudicate that claim—even though it was made in facial terms. 485 U.S. at 7 (quoting complaint).

[4] Lower courts have correctly interpreted *Pennell* to require an adequate factual record for the adjudication of takings claims. *See, e.g., Southern Pac. Transp. Co.* v. *City of Los Angeles*, 922 F.2d 498, 506 & n.9 (9th Cir. 1990) (citing *Pennell* for proposition that Supreme Court "has noted that certain facial challenges are impossible to evaluate absent some factual information regarding how the statute will be applied," and that "some regulations, by their

Under the rule of *Pennell*, the Iowa Supreme Court should have held that respondents' facial takings claim is premature, as did the state district court below. Section 352.11(1)(a) provides a defense to nuisance actions in certain limited situations. As the Iowa Supreme Court recognized, respondents did not present any proof or even allege that petitioners' activities have created or will create a nuisance. *See* App. 5a-6a. Respondents have not filed any nuisance action, and petitioners accordingly have not had occasion to assert Section 352.11(1)(a) as a defense. The mere possibility (or even likelihood) that someone will operate a farm or conduct a farm operation in this particular agricultural area in such a manner as to create an actionable nuisance that does not fall under one of the enumerated exceptions listed in Section 352.11(1)(b), and that an aggrieved party will be unable to seek redress because of Section 352.11(1)(a), does not make respondents' facial takings challenge appropriate for judicial resolution at this time. A similar likelihood existed with respect to the tenant hardship provision challenged in *Pennell*, but the Court determined that it was "premature" to consider the landlords' claim that the provision, on its face, effected a taking. 485 U.S. at 9.

Pennell makes clear that a takings claim should not be evaluated unless the record is sufficiently developed to permit the court to determine the precise nature and extent of the taking alleged. As the District Court below recognized, that record is plainly absent here. *See* App. 45a-46a.

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very nature, are just not subject to facial attack on takings grounds * * * [p]rior to their application"), *cert. denied*, 502 U.S. 943 (1991); *Tenoco Oil Co.* v. *Department of Consumer Affairs*, 876 F.2d 1013, 1026 n.18 (1st Cir. 1989) ("*Pennell* reflects the Court's continuing reluctance to treat incomplete action as a taking."); *Hammond* v. *Baldwin*, 866 F.2d 172, 178 (6th Cir. 1989) (citing *Pennell*, among other cases, for proposition that Supreme Court has repeated caveat that "[t]here is no injury to complain of until the state's action is 'complete' ").

The importance of requiring a property owner to show with particularity the exact nature and extent of the alleged taking—even in the context of a facial challenge brought under the Fifth Amendment—cannot be overstated. As this Court has observed, "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 123 (1978). No answer is possible, of course, unless a court knows precisely what activity constitutes the alleged taking. *See MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 350-351 (1986). As the Court recognized in *Pennell*, that answer is typically not available in the absence of facts establishing how the challenged statute or ordinance has been (or is likely to be) applied. *See* 485 U.S. at 10-11; *see also Virginia Surface Mining*, 452 U.S. at 296 & n.37.

Even when government-sanctioned activities constitute a nuisance within the meaning of state law, there are numerous additional factors that must be taken into account in determining whether a taking has occurred within the meaning of the Fifth Amendment, including whether the challenged activities are trespassory or nontrespassory in nature, the duration and intensity of the challenged activities, and the extent to which they diminish a property owner's use and enjoyment of property. In the absence of a record establishing such facts, judicial resolution of the constitutionality of statutes allegedly effecting a taking is premature and—as decisions like *Pennell* and *Virginia Surface Mining* establish—inappropriate.[5]

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[5] This reasoning lies at the heart of this Court's decisions involving as applied, regulatory takings claims. The Court has held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This

A factual record establishing the nature and extent of the taking alleged is indispensable for another reason. The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V, § 1, cl. 5. Thus, as this Court has recognized, the Takings Clause does not prohibit the government from condemning private property for public use; rather, it merely places a condition on the government's power to do so by requiring it to pay "just compensation." *See Preseault* v. *ICC*, 494 U.S. 1, 11 (1990); *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 314 (1987). Where, as here, a State "provides an adequate procedure for seeking just compensation, [a] property owner cannot claim a violation of the [Takings Clause] until it has used the procedure and been denied just compensation." *Williamson County Regional Planning Comm'n*, 473 U.S. at 194-195.[6] A court cannot determine whether a property owner has been denied just compensation, however, unless it can

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ripeness requirement is necessary because a regulatory taking occurs when a regulation has gone "too far," and a court cannot make this determination "unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348.

[6] Thus, the Iowa Supreme Court erred in another respect. Once it determined—erroneously, for the reasons we explain in Part II, *infra*—that Section 352.11(1)(a) effected a taking, the court should have afforded the government the option of paying respondents "just compensation," instead of declaring that the provision was unconstitutional and had no force or effect. *See First English*, 482 U.S. at 321 (once a court determines that a taking has occurred government can either amend or withdraw regulation or choose to exercise eminent domain); Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, § 15.14, at 520 (2d ed. 1992) ("Once it is determined that the government regulation or action constitutes a taking for which compensation is due, the government could choose to continue the action or regulation and pay fair market value for the permanent taking of the property.").

determine from the record the nature and extent of the taking at issue.[7]

In this case, the Iowa Supreme Court's failure to follow this Court's precedents—and in particular *Pennell*—led it to reach out and strike down pursuant to the Fifth Amendment a statutory provision found in each of the fifty States' right to farm laws without any factual showing whatsoever that such a decision was necessary, and without any factual basis upon which to properly evaluate the existence or extent of the taking alleged. This Court should grant certiorari to resolve the conflict between the Iowa Supreme Court's decision and this Court's own decisions on the minimum factual record necessary to adjudicate a facial takings claim under the Fifth Amendment.

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[7] *United States* v. *Causby*, 328 U.S. 256 (1946), illustrates this point. In that case, the owners of a chicken farm claimed that their property had been taken within the meaning of the Takings Clause by frequent and regular flights of military aircraft at low altitudes over their property. The chicken farmers had been forced to abandon their chicken business because the low-level flights had caused their chickens to fly into the walls from fright. The Court of Claims held that by virtue of the flights the government had taken an easement over the farmers' property. *Id.* at 258-259. On appeal, this Court agreed that the flights' interference with the chicken farmers' use of their property created an easement in the government's favor requiring the payment of just compensation. *Id.* at 267. The Court remanded the case for a determination of "just compensation" however, because a "precise description as to [the] nature" of the easement was not clear from the record. *See id.* at 267-268. The record failed to show either the frequency of the flights, the altitudes of the flights, or the type of aircraft involved to an extent that would permit the Court to determine what compensation was "just." *See id.* at 267.

II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE LIMITED RANGE OF GOVERNMENTAL ACTIONS THAT CAN BE CLASSIFIED AS PHYSICAL INVASIONS AND THEREFORE *PER SE* TAKINGS.

In any event, even assuming the Iowa Supreme Court properly considered respondents' facial challenge to the Iowa right to farm law, its decision holding that the statute effects a *per se* taking in violation of the Fifth Amendment is dramatically out of step with this Court's takings jurisprudence. The Iowa Supreme Court recognized that this Court has identified "two categories of state action that *must* be compensated without any further inquiry into additional factors." App. 13a (emphasis in original). As the Court explained in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), "[t]he first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* at 1015 (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The second *per se* taking category covers cases "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. In these two narrow categories of cases, a compensable taking is found without further inquiry into the economic impact of, and the governmental purpose for, the regulation at issue.

In the courts below, respondents made no claim "that the challenged statute denies them all economically beneficial or productive use of their property," App. 14a, and the Iowa Supreme Court accordingly purported to "restrict [its] discussion to the physical invasion category." App. at 15a. The court briefly discussed "[t]respassory invasions of private property by government enterprise," App. at 15a-16a, but did not suggest that it viewed the existence of Iowa's right to farm law as such an invasion. The conclusion that there was no trespassory—*i.e.*, physi-

cal—invasion should have ended the court's consideration of whether the law effected a *per se* taking.

Instead, the Iowa court turned to a discussion of what it called "[*n*]*on*trespassory invasions of private property by government enterprise." App. 16a (emphasis added).[8] The court reviewed older takings cases from this Court,[9] from which it gleaned the conclusion that a *per se* taking could occur where there is *no* physical invasion of property and where the owner does not claim that he has been deprived of all productive use of that property. This conclusion represents an unwarranted and dramatic expansion of the *per se* taking doctrine, conflicts with this Court's decision in *Lucas*, and is contrary to this Court's repeated admonition that the category of cases in which a *per se* taking may be found is "very narrow." *Loretto*, 458 U.S. at 441. *See, e.g., Yee* v. *City of Escondido*, 503 U.S. at 538-539; *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252-253 (1987); *Southview Assocs.* v. *Bongartz*, 980 F.2d 84, 93 (2d Cir. 1992) (*Yee* and *Florida Power* "confirm the narrow scope of so-called physical takings"), *cert. denied*, 507 U.S. 987 (1993); *Alaska Dep't of Natural Resources* v. *Arctic Slope Reg'l Corp.*, 834 P.2d 134, 142

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[8] Citing John W. Shonkwiler & Terry Morgan, *Land Use Litigation*, § 10.02(2) (1986), the court began its discussion with the observation that "[t]o constitute a per se taking, the government need not physically invade the surface of the land." App. 16a. The treatise it cited, however, was not expressly referring to *per se* takings. This mistaken citation, which is in direct conflict with the teachings of *Lucas*, forms the basis for the court's confusion throughout the remainder of its opinion between a taking and a *per se* taking.

[9] *See* App. 16a-20a (citing *United States* v. *Causby*, 328 U.S. 265 (1946); *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962); *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327 (1922); *United States* v. *Welch*, 217 U.S. 333 (1910); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922); *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914)). The court also cited *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), in its discussion, App. 19a. *See infra* at 20-21 (distinguishing *Nollan*).

(Alaska 1991) ("The category of *per se* takings is a narrow one").

The vast majority of courts, both state and federal, have recognized that, where a property owner is not denied all productive use of property, it is only a *physical* invasion of the property that constitutes a *per se* taking.[10] A physical taking, the Court has held, occurs "*only* where [the government] *requires* the landowner to submit to a physical *occupation* of his land." *Yee*, 503 U.S. at 527 (first and third emphases added). In *Loretto*, the Court explained at length why physical invasions are subjected to *per se* treatment. 458 U.S. at 435-438. In addition to the historical support for such treatment, the Court relied on its findings that: (1) "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests," destroying the ability to exercise the basic ownership rights of possession, use, and disposal, *id.* at 435-436; (2) "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property," *id.* at 436 (emphasis in original); (3) the *per se* rule would avoid difficult line-drawing problems with respect to how much of a physical invasion there

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[10] *See, e.g., Philip Morris, Inc.* v. *Harshbarger*, 159 F.3d 670, 674 (1st Cir. 1998); *Vesta Fire Ins. Co.* v. *Florida*, 141 F.3d 1427, 1431 (11th Cir. 1998) (government's action not in "*per se* takings category" where "neither a physical invasion nor a denial of *all* beneficial use of 'property' has been shown") (emphasis in original); *Garneau* v. *City of Seattle*, 147 F.3d 802, 809 (9th Cir. 1998); *Outdoor Graphics, Inc.* v. *City of Burlington*, 103 F.3d 690, 693-694 (8th Cir. 1996); *Texas Manufactured Housing Ass'n* v. *City of Nederland*, 101 F.3d 1095, 1105 n.11 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2497 (1997); *Branch* v. *United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 55 (1996); *Westling* v. *County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998); *San Diego Gas & Elec. Co.* v. *Superior Court*, 920 P.2d 669, 698 (Cal. 1996); *Garrett* v. *City of Topeka*, 916 P.2d 21, 30 (Kan. 1996); *Parking Ass'n of Georgia, Inc.* v. *City of Atlanta*, 450 S.E.2d 200, 202 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995); *Anchorage* v. *Sandberg*, 861 P.2d 554, 557 (Alaska 1993).

must be to have a taking, *id.* at 436-437; and (4) "whether a permanent physical occupation has occurred presents relatively few problems of proof." *Id.* at 437.[11]

These factors are not implicated by Iowa's right to farm law. The respondents' ability to possess, use, and dispose of their property has not been destroyed. At the very most, those interests may ultimately be somewhat impaired—to an as-yet unknown or ascertainable extent in the limited circumstances in which the statute actually affords a nuisance defense—if and when activities that would otherwise constitute a nuisance are conducted on the neighboring farmland. The imposition of such an impairment, however, is well within the legislature's authority to "adjust[] the benefits and burdens of economic life," *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. at 124, without providing compensation. Nor does the right to farm law involve the "direct[] inva[sion] and occup[ation of] the owner's property" that concerned the Court in *Loretto*. 458 U.S. at 436. Subjecting the right to farm law to *per se* takings treatment, moreover, would generate a host of line-drawing problems as courts struggled to determine which other "nontrespassory invasions of property" should likewise share in that treatment, and would present difficult problems of proof.

While the Iowa Supreme Court paid lip service to the requirement of a physical invasion for purposes of finding a *per se* taking, App. 13a-14a, it considered none of these factors in determining that the existence of the right to farm law resulted in a *per se* taking. Instead, it surveyed cases from this Court, decided long before the advent of modern takings jurisprudence, and determined that the Court "has allowed compensation"—without any inquiry

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[11] The *Lucas* Court offered a similar defense of application of the *per se* rule where an owner is deprived of all beneficial use by regulation short of a physical invasion. *See* 505 U.S. at 1017-19. As noted, no such claim was made here. App. 14a.

into the *Penn Central* factors—for "interferences short of physical taking or touching of land." App. 18a. These pre-*Penn Central* cases, however, do not support application of the *per se* takings doctrine in the absence of physical invasion or total deprivation of use.

Certainly the decision in *United States* v. *Causby* does not so hold. While the Iowa Supreme Court cited *Causby* for the proposition that "[t]o constitute a *per se* taking, the government need not physically invade the surface of the land," App. 16a, *Causby* itself characterized the government's overflights as "a direct invasion of respondents' domain." 328 U.S. at 265-266. This Court has since reaffirmed that *Causby* is a physical invasion case. *See Lucas,* 505 U.S. at 1015 (*Causby* involved "physical invasions of airspace"); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis,* 480 U.S. 470, 489 n.18 (1987) (citing *Causby* as a case where "interference with property can be characterized as a physical invasion by government"); *Kaiser Aetna* v. *United States,* 444 U.S. 164, 180 (1979) (*Causby* involved "physical invasion" of easement); *Penn Cent.,* 438 U.S. at 124 (same).

The Iowa Supreme Court also cited *Griggs* v. *Allegheny Country,* 369 U.S. 84 (1962), and *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U.S. 327 (1922), in support of its view that non-physical invasions short of a wholesale denial of use could constitute *per se* takings. App. 17a. Like *Causby,* however, these cases involved physical invasions of property. *See Griggs,* 369 U.S. at 88 (overflights involve invasion of "air easement"); *Portsmouth,* 260 U.S. at 330 (government responsible for "successive trespass[es]"). This Court has in fact indicated that *Griggs* and *Portsmouth* are of a piece with *Causby*. *See, e.g., Penn Cent.,* 438 U.S. at 128.

Finally, the Iowa Supreme Court relied on *Richards* v. *Washington Terminal Co.,* 233 U.S. 546 (1914), to support its expansive *per se* takings theory. The court

stated that "*Richards* 'entirely does away with the requirement of a physical taking or touching.' " App. 20a (citation omitted). Whatever else may be said of *Richards*, it seems quite evident that under modern takings jurisprudence the facts of that case would not be considered to involve a *per se* taking, but would be analyzed under the *ad hoc* factual inquiry to which most takings claims, after *Penn Central*, are subjected. Against the backdrop of this Court's careful delineation of the narrow *per se* takings categories, *Richards*—a case which has not been cited in a majority opinion of this Court for more than half a century—should not be taken to establish a third category of *per se* takings that this Court somehow overlooked in its recent decisions.[12]

Thus, the cases cited by the court below fail to support its holding that the imposition of an easement—no matter what the character of the easement or the regulation—is a *per se* taking. To be sure, this Court has held that regulations involving only an easement may be eligible for *per se* treatment, but those cases are squarely within the physical invasion category of *per se* takings. In *Nollan*, the Court found that the "appropriation of a public easement across a landowner's premises," 483 U.S. at 831, would be considered a taking without regard to the balancing of factors that would accompany a regulatory taking because of the physical nature of the invasion: "We think that a 'permanent physical occupation' has occurred, for purposes of th[e] [*per se*] rule, where individuals are given a permanent and continuous right to

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[12] The Iowa Supreme Court also cited *United States* v. *Welch*, 217 U.S. 333 (1910), as a " 'clear example' " of a *per se* " 'condemnation without any physical taking.' " App. 19a (quoting William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L. Rev. 207, 221 (1967)). *Welch*, however, involved the permanent destruction of an easement of passage—preventing the owners of that easement from physically passing over their right of way along the property—and should therefore be understood to involve a physical invasion.

pass to and fro, so that the real property may be continuously traversed." *Id.* at 832. Similarly, in *Kaiser Aetna*, the Court held that "even if the Government physically invades only an easement in property, it must nonetheless pay compensation." 444 U.S. at 180. As that language makes clear, however, it was critical that the government action at issue "will result in an actual physical invasion of the privately owned" property. *Id. See also Loretto*, 458 U.S. at 433 ("*Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of unusually serious character"). Nothing of the sort is at issue here. Indeed, the very fact that the Iowa Supreme Court acknowledged that it was considering a "nontrespassory invasion" should have led it to recognize that the government action was *not* a physical invasion, and that the right to farm law should therefore not have been considered to have effected a *per se* taking.[13]

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[13] By definition, a trespass is "an actual *physical* invasion" of land. *Williamson* v. *Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998); *Leaf River Forest Prods., Inc.* v. *Simmons*, 697 So.2d 1083, 1085 (Miss. 1996). *See also Restatement (Second) of Torts* § 158 (1965). The classic nuisance, on the other hand, involves a "nontrespassory" invasion. *See, e.g., In re Chicago Flood Litig.*, 680 N.E.2d 265, 278 (Ill. 1997); *Restatement (Second) of Torts* § 821D (1979). Thus, courts—including the Iowa courts—have long distinguished between the cause of action for trespass and for nuisance based on the need for an actual physical invasion. *See, e.g., Ryan* v. *City of Emmetsburg*, 4 N.W.2d 435, 438 (Iowa 1942) ("Trespass comprehends an actual physical invasion by tangible matter," whereas "[a]n invasion, which constitutes a nuisance is usually by intangible substances, such as noises or odors"); *Leaf River Forest Prods.*, 697 So.2d at 1085 (while "trespass requires an actual physical invasion of the plaintiff's property," the "nuisance cause of action * * * requires no actual physical invasion"); *Wilson* v. *Interlake Steel Co.*, 649 P.2d 922, 924 (Cal. 1982) (same). In limited circumstances, a physical invasion of property may constitute a nuisance, as well as a trespass. *See, e.g., Russo Farms, Inc.* v. *Vineland Bd. of Educ.*, 675 A.2d 1077, 1084 (N.J. 1996) (" 'the flooding of the plaintiff's land, which is a trespass, is also a nuisance if it is repeated or of long duration' ")

The holding that the "taking of easements in the neighbors' properties," App. 24a, by operation of the right to farm law is a *per se* taking is also inconsistent with this Court's determinations that impairing, or even extinguishing, one "strand" in the "bundle" of property rights does not alone constitute a taking. Thus, for example, in *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979), the Court observed that "the denial of one traditional property right"—here, respondents posit, the right to seek remedies for a nuisance in certain limited instances—"does not always amount to a taking." Instead, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. *See also Keystone Bituminous Coal Ass'n*, 480 U.S. at 497, 500-501; *Penn Cent.*, 438 U.S. at 130-131. As *Nollan* makes clear, it is only where that "strand" involves the right to exclude others from physical occupation of the property —where a physical occupation is authorized—that a *per se* taking results. 483 U.S. at 831. That is not the case here.

The decision of the Iowa Supreme Court is thus a startling departure from this Court's takings jurisprudence. It embraces a discredited analysis under which each right associated with a particular piece of property is itself viewed as separately subject to being taken by the government. When that narrowly defined right is extinguished, therefore, a taking will always result. As this Court aptly observed long ago, however, "[g]overnment could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co.* v. *Mahon*,

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(*quoting Restatement (Second) of Torts* § 821D, cmt. e); *Colwell Sys., Inc.* v. *Henson*, 452 N.E.2d 889, 892 (Ill. App. Ct. 1983) (same). That possibility, however, only underscores the need for concrete facts to evaluate the *per se* takings claims raised by respondents here.

260 U.S. at 413, and this Court's takings jurisprudence has been a careful effort to avoid the paralysis of over-protection while recognizing the basic right guaranteed by the Fifth Amendment. The Iowa Supreme Court's decision threatens to upset that balance; indeed, under the reasoning of the court below, it is hard to see how common zoning ordinances—long thought to be generally insulated from takings claims, and certainly not the subject of *per se* takings claims—do not work a taking. *Cf. Agins* v. *City of Tiburon*, 447 U.S. 255, 261 (1980) (enactment of zoning ordinance designed to protect residents "from the ill effects of urbanization" not a taking).[14]

The analysis adopted by the court below is in conflict not only with the framework adopted in decisions of this Court but also with efforts by other courts to apply that framework in similar contexts. In *San Diego Gas & Electric Co.* v. *Superior Court*, 920 P.2d 669, 698 (Cal. 1996), for example, the California Supreme Court rejected a claim that "an intangible intrusion onto plaintiff's property" by electric and magnetic fields was a taking without regard to its economic impact. Maryland's highest court has likewise rejected efforts to expand the category of *per se* takings beyond those recognized by this Court. In *Maryland Port Admin.* v. *QC Corp.*, 529 A.2d 829 (Md. 1987), that court declined to find a *per se* taking where a business complained about the operation of a landfill on adjoining property, and specifically that "the ambient air over [its] property contains chrome." *Id.* at 834. Critical to the court's conclusion was the fact that there was no

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[14] While zoning ordinances generally prohibit certain uses of property and the right to farm law affirmatively protects certain uses, there is no constitutional distinction between the two. As the Court explained in *Lucas*, "the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis; * * * [and] cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation." 505 U.S. at 1026.

physical invasion of the property. *Id.* at 834-838. The Second Circuit in *Southview Assocs., supra,* rejected a claim that a *per se* physical taking occurred when a landowner was denied a permit for a specific proposed development (but not all development) on the ground that the development would adversely affect a nearby deer habitat. 980 F.2d at 92-95. Under the decision of the Iowa Supreme Court below, each of these cases—and countless other similar decisions—might well have come out differently. The existence of such a conflict among the courts is yet another compelling reason for this Court to review the decision below.[15]

III. THE DECISION BELOW CALLS INTO QUESTION THE CONSTITUTIONALITY OF LAWS EXISTING IN ALL FIFTY STATES AND THREATENS TO UPSET SETTLED TAKINGS JURISPRUDENCE.

The decision of the Iowa Supreme Court plainly warrants review under the standards commonly applied by this Court, for at least three reasons.

First, the decision holding the right to farm law unconstitutional is of critical importance because of its widespread effects on similar laws. While even the court below recognized that the decision is important in Iowa itself, *see* App. 26a ("We recognize that political and economic fallout from our holding will be substantial"), the decision necessarily calls into question the right to farm laws that exist in *all fifty States. See* App. 72a-73a. One recent commentator has called such laws (along with property tax relief) "by far the most ubiquitous farmland protection program in this country." Alexander A. Reinart,

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[15] The Iowa court's holding that the right to farm law effects a taking when it withdraws the right to bring a nuisance action is also inconsistent with the settled rule that States are free to create or eliminate causes of action and defenses thereto. *See Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (citing cases); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432-433 (1982).

The Right to Farm: Hog-Tied and Nuisance-Bound, 73 N.Y.U. L. Rev. 1694, 1695 (Nov. 1998). These laws are not some recently-revived relic of idyllic, agrarian days gone by. Instead, the vast majority of the Nation's right to farm laws were adopted in the last twenty years. *Id.* at 1707. These laws thus represent the contemporaneous and unanimous judgment of the States that farming is worth preserving and protecting, and that protections—such as those from certain nuisance actions—are appropriately offered to farmers as a means of adjusting the economic burdens on and benefits to landowners in our society.

Although varying in details, the essential and underlying purpose of each State's right to farm law is the same—to give agricultural operations a reasonable and qualified defense to nuisance actions. At bottom, regardless of the exact nature of this defense in each State, all right to farm laws share the common trait of providing protection for activities that might otherwise be determined to be a nuisance. The Court below found that the law created an easement because it "allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance." App. 13a. This easement, the court ruled, was a taking *per se.* Under this analysis, the right to farm laws in all fifty States constitute *per se* takings and are facially unconstitutional.

The Court has recognized that certiorari is warranted where a decision implicates the laws of many (in this case, all) States. *See, e.g., New York* v. *Ferber,* 458 U.S. 747, 749 & n.2 (1982) (certiorari granted when state court struck down state statute with counterparts in 19 other States); *New York* v. *O'Neill,* 359 U.S. 1, 3 (1959) (certiorari granted to review state court decision striking down state statute "inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two states"). The question presented here is of such gravity that the Court ought to grant the petition.

Second, as we have explained, the Iowa Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). Over the past two decades, beginning with its seminal decision in *Penn Central,* the Court has devoted substantial effort to articulating and developing takings jurisprudence in the context of the modern regulatory state. An important part of this jurisprudence, of course, is the clarification—in *Lucas* and *Nollan* in particular—that some regulatory actions are of such a nature that no *ad hoc* balancing is necessary. As this case demonstrates, however, unless the *per se* categories are themselves carefully delimited, the incremental advances in takings jurisprudence crafted by the Court could well be jettisoned in favor of categorical rules that over-protect the rights of some property owners—at the expense of others.

The Court has also been concerned that takings challenges be entertained only on the basis of an adequate factual record, and cautioned against adjudicating such claims in the abstract. *See supra* at 9-10. The Iowa Supreme Court has cavalierly ignored these warnings, and has instead permitted the blunt instrument of a facial takings challenge to strike down a law that could in many circumstances have little or no real impact on those who claim their property interests are implicated. In addition to clarifying the *per se* takings doctrine, therefore, this case presents the Court with an opportunity to clarify the limited scope of facial challenges to laws said to work a taking.

Here, as noted, the willingness of the Iowa Supreme Court to expand the categories of *per se* takings beyond those recognized by this Court conflicts with the approach of other courts, and therefore the Court should grant the petition in this case to correct the Iowa Supreme Court's misguided decision in this important area of federal constitutional law. In any event, takings claims by their

nature present uniquely *ad hoc* and factual disputes—or ought to—and the Court has accordingly not found it necessary to await a direct conflict before undertaking necessary clarification in this difficult area. *See Dolan* v. *City of Tigard,* 512 U.S. 374, 383 (1994) (certiorari granted because the Oregon Supreme Court had allegedly misapplied *Nollan*); *see also Parking Ass'n of Georgia, Inc.* v. *City of Atlanta,* 515 U.S. 1116, 1118 (1995) ("In the past, the confused nature of some of our takings case law and the fact-specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict.") (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari).

Third, the reasoning of the Iowa Supreme Court's decision also calls into question a wide variety of other laws and regulatory regimes. The threat posed by the decision below is not limited to farmers in Iowa or around the country; if it were applied to analogous situations, it could threaten other land use regulation, including environmental protection and zoning ordinances. Traditionally, these laws have withstood takings challenges—and certainly *per se* takings challenges—because local governments and state legislatures are afforded wide discretion to adjust the benefits and burdens of economic life for the greater common good. *See, e.g., Developments in the Law—Zoning,* 91 Harv. L. Rev. 1427, 1471 (1978) ("Land use regulation typically is required not because one competing use is inherently noxious, but rather because equally innocent uses inevitably conflict and demand some form of legislative resolution."). The Iowa Supreme Court's decision will now allow takings challenges to sidestep the protection afforded by the balancing of competing interests; under its decision, any law that can be characterized as creating an easement—without any physical invasion of the property—is unconstitutional without more. This evisceration of the physical invasion standard effectively permits *per se* takings doctrine to engulf takings jurispru-

dence. This Court should grant certiorari and reverse the judgment below to make clear that the range of governmental actions that can be considered *per se* takings is far more limited than the Iowa Supreme Court understood.

Finally, we note that this case is an ideal vehicle for consideration of the question presented. As the Iowa Supreme Court observed, "the facts are not in dispute." App. 5a. The federal constitutional issue was squarely presented to and decided by the Iowa Supreme Court. There is no need to let this important question percolate in the lower courts, visiting upon other States the "fallout" that Iowa will realize from the decision below, or to await a better vehicle for resolving the question. The Court should grant certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF IOWA

No. 96-2276

CLARENCE BORMANN and CAROLINE BORMANN, Husband and Wife; LEONARD MCGUIRE and CECELIA MCGUIRE, Husband and Wife,

Appellants,

v.

BOARD OF SUPERVISORS IN AND FOR KOSSUTH COUNTY, IOWA; and JOE RAHM, AL DUDDING, LAUREL FANTZ, JAMES BLACK, and DONALD MCGREGOR, In Their Capacities as Members of the Board of Supervisors,

Appellees,

GERALD GIRRES, JOAN GIRRES, MIKE GIRRES, NORMA JEAN THUL, JERALD THILGES, SHIRLEY THILGES, THELMA THILGES, EDWIN THILGES, RALPH REDING, LORETTA REDING, BERNARD THILGES, JACOB THILGES, JOHN GOECKE, and PATRICIA GOECKE,

Intervenors-Appellees.

Sept. 23, 1998

LAVORATO, Justice.

In this appeal we are asked to decide whether a statutory immunity from nuisance suits results in a taking of private property for public use without just compensation in violation of federal and Iowa constitutional provi-

sions. We think it does. We therefore reverse a district court ruling holding otherwise and remand. In doing so, we need not reach a second constitutional challenge.

I. Facts and Proceedings.

The facts are not in dispute. In September 1994, Gerald and Joan Girres applied to the Kossuth County Board of Supervisors for establishment of an "agricultural area" that would include land they owned as well as property owned by Mike Girres, Norma Jean Thul, Gerald Thilges, Shirley Thilges, Thelma Thilges, Edwin Thilges, Ralph Reding, Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke and Patricia Goecke (applicants). *See* Iowa Code § 352.6 (1993). The real property involved consisted of 960 acres. On November 10, 1994, the Board denied the application, making the following findings and conclusions:

> a. The Board finds that the policy in favor of agricultural land preservation is not furthered by an Agricultural Area designation in this case as there are no present or foreseeable nonagricultural development pressures in the area for which the designation is requested.
>
> b. The Board also finds that the Agricultural Area designation and the nuisance protections provided therein will have a direct and permanent impact on the existing and long-held private property rights of the adjacent property owners.
>
> c. Thus, the Board concludes that the policy in favor of agricultural land preservation as set forth in Iowa Code chapter 352 is outweighed by the policy in favor of the preservation of private property rights.
>
> d. Accordingly, the Board finds that the adoption of the Agricultural Area designation in this case is inconsistent with the purposes of Iowa Code chapter 352.

Two months later, in January 1995, the applicants tried again with more success. The Board approved the agricultural area designation by a 3-2 vote—one of which was based on the "flip [of] a nickel." In granting the designation, the Board this time found that the application to create the agricultural area designation "complies with Iowa Code section 352.6 and that the adoption of the proposed agricultural area is consistent with the purposes of Chapter 352."

In April 1995, several neighbors of the new agricultural area filed a writ of certiorari and declaratory judgment action in district court. The defendants were the Board and individual board members Joe Rahm, Al Dudding, Laurel Fantz, James Black, and Donald McGregor (Board).

The plaintiffs, Clarence and Caroline Bormann and Leonard and Cecelia McGuire (neighbors), challenged the Board's action in a number of respects. The neighbors alleged the Board's action violated their constitutionally inalienable right to protect property under the Iowa Constitution, deprived them of property without due process or just compensation under both the federal and Iowa Constitutions, denied them due process under the federal and Iowa Constitutions, ran afoul of res judicata principles, and was "arbitrary and capricious." The applicants intervened.

Based on stipulated facts, memoranda and oral argument, the district court determined that the Board's action was "arbitrary and capricious." Apparently, the determination was based on one Board member voting on the basis of a flipped coin. This was the only ground on which the court ruled for the neighbors. The court rejected all of their other arguments.

Later, the neighbors filed an Iowa Rule of Civil Procedure 179(b) motion asking the court to clarify its ruling. Meanwhile, the Board corrected the "arbitrary and capri-

cious" infirmity to its November 1995 vote. The neighbors then sought, and received, a certification of appeal from this court.

II. Scope of Review.

The neighbors sued at law and titled their petition as one for writ of certiorari and one for declaratory judgment. In the petition for writ of certiorari, the neighbors asked that a writ of certiorari issue because the Board's decision was "in excess of" the Board's "jurisdiction" and was "contrary to law" and "illegal" because the decision "violates the Fifth Amendment to the United States Constitution, and article I, section 18 of the Iowa Constitution" in that the decision "effects a taking of the [neighbors'] private property for a use that is not public." The petition asked that the decision be annulled and decreed to be void.

In the petition for declaratory relief, the neighbors sought a declaration that the Board's decision violates the "Fifth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and article I, section 18 of the Iowa Constitution."

Iowa Rule of Civil Procedure 306 authorizes the district court to issue a writ of certiorari "where an inferior tribunal, *board or officer* exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." (Emphasis added.) Our scope of review is limited to sustaining a board's decision or annulling it in whole or in part. *Grant v. Fritz*, 201 N.W. 2d 188, 189 (Iowa 1972). In addition, the fact that the plaintiff has another adequate remedy does not preclude granting the writ. Iowa R. Civ. P. 308.

Thus, here, a petition for a writ of certiorari is appropriate to test the legality of the Board's decision. Our scope of review is limited to sustaining the Board's decision or annulling it in whole or in part. In addition, the fact that the neighbors may have another adequate

remedy, like declaratory judgment, does not preclude our granting relief under Rule 306.

Iowa Rule of Civil Procedure 261 (declaratory judgment) authorizes "[c]ourts of record within their respective jurisdiction [to] declare rights, status, and other legal relations whether or not further relief is or could be claimed."

The purpose of a declaratory judgment is to determine rights in advance. *Miehls v. City of Independence*, 249 Iowa 1022, 1030, 88 N.W.2d 50, 55 (1958). The essential difference between such an action and the usual action is that no actual wrong need have been committed or loss incurred to sustain declaratory judgment relief. *Id.* at 1031, 88 N.W.2d at 55. But there must be no uncertainty that the loss will occur or that the right asserted will be invaded. *Id.* As with a writ of certiorari, the fact that the plaintiff has another adequate remedy does not preclude declaratory judgment relief where it is appropriate. Iowa R. Civ. P. 261.

We think the facts here are sufficient for us to proceed under either remedy. In addition, because the facts are not in dispute, we need not concern ourselves with whether we employ a correction-of-errors-at-law review or a de novo review. Our only question is a legal one.

III. The Takings Challenge.

A. The parties' contentions. The Board's approval of the agricultural area here triggered the provisions of Iowa Code section 352.11(1)(a). More specifically, the approval gave the applicants immunity from nuisance suits. The neighbors contend that the approval with the attendant nuisance immunity results in a taking of private property without the payment of just compensation in violation of federal and state constitutional provisions.

The neighbors concede, as they must, that their challenge to section 352.11(1)(a) is a facial one because the

neighbors have presented neither allegations nor proof of nuisance. However, the neighbors strenuously argue that in a facial challenge context courts have developed certain bright line tests that spare them from this heavy burden. Specifically, the neighbors say, these bright line tests provide that a governmental action resulting in the condemnation or the imposition of certain specific property interests constitutes automatic or per se takings.

Here, the neighbors argue further, that the section 352.11(1)(a) immunity provision gives the applicants the right to create or maintain a nuisance over the neighbors' property, in effect creating an easement in favor of the applicants. The creation of the easement, the neighbors conclude, results in an automatic or per se taking under a claim of regulatory taking.

The Board and applicants respond that a per se taking occurs only when there has been a permanent physical invasion of the property or the owner has been denied all economically beneficial or productive use of the property. They insist the record reflects neither has occurred. Thus, they contend, the court must apply a balancing test enunciated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). They argue that under that balancing test the neighbors lose.

B. The relevant constitutional and statutory provisions.

1. The constitutional provisions. The Fifth Amendment to the Federal Constitution pertinently provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the Federal Constitution prohibits a state from "depriving any person of life, liberty, or property without due process of law." The Fourteenth Amendment makes the Fifth Amendment applicable to the states and their political subdivisions.

Chicago B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 234-35, 17 S.Ct. 581, 584, 41 L.Ed. 979, 983-84 (1897).

Article I, section 9 of the Iowa Constitution pertinently provides that "no person shall be deprived of life, liberty, or property, without due process of law." Article I, section 18 of the Iowa Constitution provides:

> Eminent domain—drainage ditches and levees. Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury.

2. The statutory provisions. Iowa Code section 352.6 sets forth the procedure for obtaining an agricultural area designation. The application is to the county board of supervisors. Iowa Code § 352.6. This provision also prescribes the conditions under which a county board of supervisors may designate farmland as an agricultural area. *Id.* An agricultural area includes, among other activities, raising and storing crops, the care and feeding of livestock, the treatment or disposal of wastes resulting from livestock, and the creation of noise, odor, dust, or fumes. Iowa Code § 352.2(6).

Iowa Code section 352.11(1)(a) provides the immunity from nuisance suits:

> A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in section 352.9.

The immunity does not apply to a nuisance resulting from a violation of a federal statute, regulation, state

statute, or rule. Iowa Code § 352.11(1)(b). Nor does the immunity apply to a nuisance resulting from the negligent operation of the farm or farm operation. *Id.* Additionally, there is no immunity from suits because of an injury or damage to a person or property caused by the farm or farm operation before the creation of the agricultural area. *Id.* Finally, there is no immunity from suit "for an injury or damage sustained by the person [bringing suit] because of the pollution or change in condition of the waters of a stream, the overflowing of the person's land, or excessive soil erosion into another person's land, unless the injury or damage is caused by an act of God." *Id.*

Iowa Code section 657.1 defines nuisance and provides for civil remedies:

> Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.

Iowa Code section 657.2 is a laundry list of the conduct or conditions that are deemed to be a nuisance. Those that are relevant to nuisances resulting from farming and farm operations include:

> 1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, unreasonably offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.

> 2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.
>
> . . . .
>
> 4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.

Iowa Code § 657.2.

Our cases recognize that the statutory definition of nuisance does not "modify the common-law's application to nuisances." *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996). Rather, the statutory provisions "are skeletal in form, and [we] look to the common law to fill in the gaps." *Id.*

There are two kinds of nuisances: public and private. We cited the differences between the two in *Guzman v. Des Moines Hotel Partners:*

> A public or common nuisance is a species of catchall criminal offenses, consisting of an interference with the rights of a community at large. This may include anything from the obstruction of a highway to a public gaming house or indecent exposures. A private nuisance, on the other hand, is a civil wrong based on a disturbance of rights in land. . . . The essence of a private nuisance is an interference with the use and enjoyment of land. Examples include vibrations, blasting, destruction of crops, flooding, pollution, and disturbance of the comfort of the plaintiff, as by unpleasant odors, smoke, or dust.

489 N.W.2d 7, 10 (Iowa 1992) (citations omitted). We are dealing here with private nuisances.

To fully understand the issues we are about to discuss, we think it would aid our analysis to distinguish between

the concepts of "private nuisance" and "trespass." We made this distinction in *Ryan v. City of Emmetsburg:*

> As distinguished from trespass, which is an actionable invasion of interests in the exclusive possession of land, a private nuisance is an actionable invasion of interests in the use and enjoyment of land. Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors.

232 Iowa, 600, 603, 4 N.W.2d 435, 439 (1942).

In *Ryan,* we also distinguished between the concepts of "nuisance" and "negligence." Negligence is a type of liability-forming conduct, for example, a failure to act reasonably to prevent harm. *Id.* In contrast, nuisance is a liability-producing condition. *Id.* Negligence may or may not accompany a nuisance; negligence, however, is not an essential element of nuisance. *Id.* If the condition constituting the nuisance exists, the person responsible for it is liable for resulting damages to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance. *Id.*

C. The framework of analysis. As the neighbors point out, the federal and state constitutional provisions we set out earlier provide the following framework for a "takings" analysis: (1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been "taken" by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner? The neighbors contend there is a constitutionally protected private right which the Board has taken from them without paying just compensation. That taking, the neighbors contend, results from the Board's approval of the agricultural area triggering the nuisance immunity in section 352.11(1)(a).

The Board and the applicants concede the neighbors have received no compensation so we need not concern ourselves with the third step of the analysis: Has just compensation been paid to the owner?

1. Is there a constitutionally protected private property interest at stake?

a. Does the immunity provision in section 352.11(1)(a) against nuisance suits create a property right? Textually, the federal and Iowa Constitutions prohibit the government from taking property for public use without just compensation. Property for just compensation purposes means "the group of rights inhering in the citizens' relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357. 359, 89 L.Ed. 311, 318 (1945). In short, property for just compensation purposes includes "every sort of interest the citizen may possess." *Id.; see also Liddick v. Council Bluffs,* 232 Iowa 197, 221-22, 5 N.W.2d 361, 374 (1942) ("[P]roperty is not alone the corporeal thing, but consists also in certain rights therein created and sanctioned by law, of which, with respect to land, the principal ones are the rights of use and enjoyment. . . .").

State law determines what constitutes a property right. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358, 362 (1980). Thus, in this case, Iowa law defines what is property.

The property interest at stake here is that of an easement, which is an interest in land. Over one hundred years ago, this court held that the right to maintain a nuisance is an easement. *Churchill v. Burlington Water Co.*, 94 Iowa 89, 93, 62 N.W. 646, 647 (1895). *Churchill* defines an easement as

> a privilege without profit, which the owner of one neighboring tenement [has] of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not do something on his own land, for the advantage of the dominant owner.

Id.

Churchill's holding that the right to maintain a nuisance is an easement and its definition of an easement are consistent with the Restatement of Property:

> An easement is an interest in land which entitles the owner of the easement to *use* or enjoy land in the possession of another. . . . It may entitle him to do acts which he would otherwise not be privileged to do, or it may merely entitle him to prevent the owner of the land subject to the easement from doing acts which he would otherwise be privileged to do. An easement which entitles the owner to do acts which, were it not for the easement, he would not be privileged to do, is an affirmative easement. . . . [The easement] may entitle [its] owner to do acts on his own land which, were it not for the easement, would constitute a nuisance.

Restatement of Property § 451 cmt. a, at 2911-12 (1944) (emphasis added).

Another feature of easements is that easements run with the land:

> The land which is entitled to the easement or service is called a dominant tenement, and the land which is burdened with the servitude is called the servient tenement. Neither easements [n]or servitudes are personal, but they are accessory to, and run with, the land. The first with the dominant tenement, and the second with the servient tenement.

Dawson v. McKinnon, 226 Iowa 756, 767, 285 N.W. 258, 263 (1939).

Thus, the nuisance immunity provision in section 352.11(1)(a) creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. For example, in their farming operations the applicants would be allowed to generate "offensive smells" on their property which without the easement would permit affected property owners to sue the applicants for nuisances. *See* Iowa Code § 352.2(6); *see also Buchanan v. Simplot Feeders Ltd. Partnership*, 134 Wash.2d 673, 952 P.2d 610, 615 (1998) (holding that Washington's Right-to-Farm Act gives farm quasi easement, against urban developments that subsequently locate next to farm, to continue nuisance activities) (dictum).

b. Is an easement a protected property right subject to the requirements of the just compensation clauses of the federal and Iowa Constitutions? Easements are property interests subject to the just compensation requirements of the Fifth Amendment to the Federal Constitution. *United States v. Welch*, 217 U.S. 333, 339, 30 S.Ct. 527, 527, 54 L.Ed 787, 788 (1910). Easements are also property interests subject to the just compensation requirements of our own Constitution. *Simkins v. City of Davenport*, 232 N.W.2d 561, 566 (Iowa 1975).

c. Has the easement resulted in a taking?

(1) Takings jurisprudence, generally. There are two categories of state action that *must* be compensated without any further inqury into additional factors, such as the economic impact of the governmental conduct on the landowner or whether the regulation substantially advances a legitimate state interest. The two categories include regu-

lations that (1) involve a permanent physical invasion of the property or (2) deny the owner all economically beneficial or productive use of the land. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). These two categotries are what the neighbors term "per se" takings. The per se rule regarding the first category—physical invasion—was firmly established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425, 102 S.Ct. 3164, 3171, 78 L.Ed.2d 868, 886 (1982).

Presumably, in all other cases involving "regulatory takings" challenges, the United States Supreme Court engages in a case-by-case examination in determining at which point the exercise of the police power becomes a taking. *Id.* This ad hoc approach calls for a balancing test that is essentially one of reasonableness. The test focuses on three factors: (1) the economic impact of the regulation on the claimant's property; (2) the regulation's interference with investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978). According to some commentators, a court must first find that the regulation substantially advances legitimate state interests before the court may test the regulation against the three factors in *Penn Central. See, e.g.,* Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches,* 39 Hastings L.J. 335, 351 (1988).

(2) Physicial invasion. The Board and applicants contend the neighbors' argument fails under both categories of per se takings: physical invasion and denial of all economically beneficial or productive use of the property. The neighbors do not contend the record supports a finding that the challenged statute denies them all economically beneficial or productive use of their property.

Accordingly, we restrict our discussion to the physical invasion category.

According to one commentator.

> [t]he term "regulatory taking" refers to situations in which the government exercises its "police powers" to restrict the use of land or other forms of property. This is often accomplished through implementation of land use planning, zoning and building codes. In contrast, a governmental entity exercises its eminent domain power or acts in an "enterprise capacity, where it takes unto itself private resources and uses them for the common good." Where the private landowner will not sell the land, the government entity seeks condemnation of the property and pays a fair purchase price to be determined in court. On the other hand, an inverse condemnation claim is sought by a landowner when the government fails to seek a condemnation action in court.

John W. Shonkwiler & Terry Morgan, *Land Use Litigation* § 1.02, at 6 (1986) [hereinafter Shonkwiler]. The neighbors' challenge here is one of inverse condemnation.

We think it would aid our analysis of the neighbors' takings argument to discuss those cases where a government entity acting in its enterprise capacity has appropriated private property without first exercising its eminent domain power.

(a) Trespassory invasions of private property by government enterprise. Generally, when the government has physically invaded property in carrying out a public project and has not compensated the landowner, the United States Supreme Court will find that a per se taking has occurred. *See Shonkwiler* § 10.01(a) at 369. For example, in *Pumpelly v. Green Bay & Mississippi Canal Co.*, the Court held there was a taking where the defendant's construction of a dam, pursuant to state authority,

permanently flooded the plaintiff's property. 13 Wall. 166, 80 U.S. 166, 181, 20 L.Ed. 557, 561 (1871). In so holding, the Court enunciated the following rule:

> [W]here real estate is actually invaded by super-induced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution.

Id.

In a more recent case, the Court applied the same rule to a state law that authorized third parties to physically intrude upon private property. *Loretto*, 458 U.S. at 432 n. 9, 102 S.Ct. at 3174 n. 9, 73 L.Ed.2d at 880 n. 9 (holding that a New York statute requiring the owners of apartment buildings to permit cable television operators to install transmission facilities on their property was in violation of the Just Compensation Clause).

(b) Nontrespassory invasions of private property by government enterprise. To constitute a per se taking, the government need not physically invade the surface of the land. *See* Shonkwiler § 10.02(2), at 370. For example, in *United States v. Causby*, the Court held that the frequent and regular flights of government planes over the plaintiffs' land had created an easement in the lands for the benefit of the government. 328 U.S. 256, 266-67, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206, 1213 (1946). The plaintiffs owned a small chicken farm near an airport leased by the government for use by army and navy aircraft. The glide path of one of the runways passed right over the plaintiffs' land at a height of only eighty-three feet. As a result of the aircraft's noise, the plaintiffs had to abandon their commercial chicken operation. *Id.*

The Court held that the flights' interference with the use of the plaintiffs' land constituted a taking of a flight easement that had to be compensated on the basis of

diminution in the land's value resulting from the easement. *Id.* at 261-62, 66 S.Ct. at 1066, 90 L.Ed. at 1210. In the course of its opinion, the Court stated:

> [T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. . . . The reason is that there [is] an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. . . . The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think the landowner, as an incident to his ownership, has a claim to it and invasions of it are in the same category as invasions of the surface. . . . Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

Id. at 265-67, 66 S.Ct. at 1067-68, 90 L.Ed. at 1212-13; *accord Griggs v. Allegheny County,* 369 U.S. 84, 89, 82 S.Ct. 531, 533-34, 7 L.Ed.2d 585, 588-89 (1962); *see also Portsmouth Harbor Land & Hotel Co. v. United States,* 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922) (holding that firing, and imminent threat of firing, of navy coastal guns over plaintiff's property imposed a "servitude" upon the plaintiff's land and thus amounted to a taking of some interest for public use); *Dolezal v. City of Cedar Rapids,* 209 N.W.2d 84, 87 (Iowa 1973) (recognizing a navigation easement as one that permits free flights over land including those so low and so frequent

as to amount to a taking of property); 2A Philip Nichols, *Eminent Domain* § 6.06, at 6-92 (3d rev. ed. 1998) ("Physical invasions of property are not limited to human or even vehicular entry. To the contrary, the majority of cases involve the transmission of smoke, dust, earth, water, sewage or some other agent onto the impacted property. Regardless of the agent, the result of the invasion may be diminution in values of the property, partial or complete (and permanent and temporary) appropriation, or complete destruction.") [hereinafter Nichols].

In *Fitzgerald v. City of Iowa City,* 492 N.W.2d 659, 663 (Iowa 1992), we had occasion to consider a physical invasion claim involving overflying aircraft. As in *Causby,* the plaintiffs in *Fitzgerald* claimed the overflying aircraft so adversely affected the use and enjoyment of their property that a taking had resulted. We rejected the claim because the plaintiffs had failed to prove a "measurable decrease in market value" due to the overflying aircraft. *Id.* at 665. Nevertheless, we cited *Causby* for the proposition that "[i]n some circumstances, overflying aircraft may amount to a physical invasion." *Id.* We recognized that when interferences with property from overflying aircraft result in a measurable decrease in property market value, a taking has occurred. *Id.* at 663. In such cases, we said "the right to recovery is not for the nuisance that must be endured but for the loss of value that has resulted." *Id.* The loss-in-value measure of damages is what we would ordinarily use in eminent domain cases. *Id.* As mentioned, *Causby* used this same measure of damages.

The United States Supreme Court has allowed compensation for other kinds of interferences short of physical taking or touching of land. *See* William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect,* 71 Dick. L.Rev. 207, 220-21 (1967) [hereinafter Stoebuck]. For example, in *United States v. Welch,* the plaintiff had a passage easement over a neighbor's property. 217 U.S. 333, 339, 30 S.Ct. 527, 527,

54 L.Ed. 787, 789-90 (1910). The passage was the plaintiff's only access to a county road. The government flooded the neighbor's property thereby cutting off the plaintiff's only access to the road. The Court held the plaintiff was entitled to compensation for the easement. *Id.* at 339, 30 S.Ct. at 527, 54 L.Ed. at 789-90 Because the benefitted land—plaintiff's property—was not physically touched, this case is "a clear example of condemnation without any physical taking." Stoebuck, at 221; *see Nollan v. California Coastal Comm'n,* 483 U.S. 825, 831, 107 S.Ct. 3141, 3143, 97 L.Ed.2d 677, 687 (1987) (holding that requiring property owner to give easement of access across his property to obtain a building permit was a physical taking of private property that required compensation).

In *Pennsylvania Coal Co. v. Mahon,* a state statute prohibited coal mining if it were done in a manner to cause subsidence of any dwelling. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The plaintiff had a contract to mine coal under a dwelling but the statute prevented the plaintiff from doing so. *Id.* The Court held the statute was an attempt to condemn property—the right to mine coal—without compensation. *Id.* at 414, 43 S.Ct. at 159-60, 67 L.Ed. at 326. *Mahon* "is a situation in which, by denying an owner the occupancy and use of his property interest, the government takes the interest without any semblance of physical intrusion." *Stoebuck,* at 221.

Richards v. Washington Terminal Co. presents a factual scenario closer to the facts in this case. 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914). In *Richards,* the plaintiff owned residential property along the tracks of a railroad that had the power of eminent domain. The property lay near the mouth of a tunnel. The Court recognized that two kinds of the railroad's activities had partially destroyed the plaintiff's interest in the enjoyment of his property. The first kind involved smoke, dust,

cinders, and vibrations invading the plaintiff's property at all points at which the property abutted the tracks. The second kind involved gases and smoke emitted from engines in the tunnel that contaminated the air and invaded the plaintiff's property. A fanning system inside the tunnel forced the emission of the gases and smoke from the tunnel. As to the first activity, the Court denied compensation because it was the kind of harm normally incident to railroading operations. *Id.* at 554-55, 34 S.Ct. at 657-58, 58 L.Ed. at 1091-92. As to the second activity—gases and smoke from the tunnel—the Court concluded the plaintiff was entitled to compensation for the "special and peculiar damage" resulting in diminution of the value of the plaintiff's property. *Id.* at 557, 34 S.Ct. at 658, 58 L.Ed. at 1093.

Richards is viewed as recognizing the taking of a property interest or right "to be free from 'special and peculiar' governmental interference with enjoyment." Stoebuck, at 220. The taking involved "no kind of physical taking or touching—none whatever." *Id.* Viewed in this light, *Richards* "entirely does away with the requirement of a physical taking or touching." *Id.*; *see* Nichols § 6.01, at 6-9 n. 11 ("It is not necessary, in order to render a statute obnoxious to the restraint of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or thing itself, so long as it affects its free use and enjoyment. . . .").

(c) Liability of government for a taking by the operation of a nuisance-producing governmental enterprise. With regard to private nuisances,

> [t]he power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably. . . . It has been broadly stated, as an additional limitation to the power of the legislature, that . . . the legislature may not authorize

> the use of property in such a manner as unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation.

66 C.J.S. *Nuisances* § 7, at 738 (1950).

Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards,* holding that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking." *Richards,* 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091; *see also Pennsylvania R.R. v. Angel,* 41 N.J. Eq. 316, 7 A. 432, 433 (1886) ("[A]n act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.").

A number of state courts have decided takings cases on the basis that the government entity operated a nuisance-producing enterprise. *See, e.g., Thornburg v. Port of Portland,* 233 Or. 178, 376 P.2d 100, 106 (1962) ("[A] taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions called 'nuisance.' "). Significantly, a large number of these cases deal with smoke and odors from sewage disposal plants and city dumps. One commentator describes the cases this way:

> Typically, a city sewage plant or dump in the vicinity of, but not necessarily directly adjacent to, the plain-

> tiff's land has wafted its noxious smoke, odors, dust, or ashes, usually combinations of these, over the plaintiff's land, with the obvious result of lessening its enjoyment. No physical touching is present, nor do the courts try to equate the municipal acts with touchings. [Several states] have allowed eminent domain compensation in cases of this kind. . . . More significant than a court's language is the result it announces, and in this respect all the decisions stand for the proposition that nuisance-type activities are a taking. . . .

Stoebuck, at 226-27; *see also Nichols* § 6.07, at 6-112 to 6-113 ("[G]eneration of offensive odors, gases, smoke . . . may constitute a taking.").

The commentator ascribes a name to the theory of these cases: condemnation by nuisance. Stoebuck, at 226. And the commentator has formulated the theory this way: "governmental activity by an entity having the power of eminent domain, which activity constitutes a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation." *Id.* at 208-09; *see also City of Georgetown v. Ammerman,* 143 Ky. 209, 136 S.W. 202, 202 (1911) (holding that odors from city dump adjacent to plaintiff's property created a nuisance that was a taking of the property); *Ivester v. City of Winston-Salem,* 215 N.C. 1, 1 S.E.2d 88, 88-90 (1939) (holding as part of fundamental law of North Carolina that odors from disposal plant next to plaintiff's property constituted nuisance and were a taking; North Carolina has no constitutional provision for a "taking"); *Brewster v. City of Forney,* 223 S.W. 175, 178 (Tex. Com.Ct.App.1920) (holding under Texas Constitution that odors from a nearby sewage disposal plant resulted in a taking of plaintiff's property); Nichols § 6.07, at 6-112 (stating under broad view of property—right to use, exclude, and dispose—there need not be a physical taking of the property or even dispossession; any substantial interference

with the elemental rights growing out of property ownership is considered a taking).

One court long ago anticipated the so-called condemnation by nuisance theory this way:

> Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense.

Pennsylvania R.R. v. Angel, 7 A. at 433-34.

Our own definition of a taking is in accord with this concept:

> [A] "taking" does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.

Phelps v. Board of Supervisors of County of Muscatine, 211 N.W.2d 274, 276 (Iowa 1973) (holding that construction of a bridge and causeway over river in such a manner as to allegedly cause greater flooding on adjacent property than previously was a "taking" within the meaning of the Iowa Constitution).

As mentioned, the Board's approval of the applicants' application for an agricultural area triggered the provisions of section 352.11(1)(a). The approval gave the applicants immunity from nuisance suits. (Significantly, section 352.2(6) allows an agricultural area to include activities such as the creation of noise, odor, dust, or

fumes.) This immunity resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution. This also amounts to a taking of private property for public use in violation of article I, section 18 of the Iowa Constitution.

In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and article I, section 18 of the Iowa Constitution.

The district court erred in concluding otherwise.

D. The remedy. In *Agins v. Tiburon,* the California Supreme Court held that when legislation results in a taking, the landowner's remedy is to seek a declaratory judgment action that the legislation is invalid because it makes no provision for payment of just compensation. 157 Cal. Rptr. 372, 598 P.2d 25, 28 (Cal.1979); *see* 1 Nichols, *Eminent Domain* § 1.42(1), at 1-157 (3d rev. ed.1997). The court, however, refused for policy reasons to allow the landowner to sue in inverse condemnation for temporary takings damages. Temporary takings damages represent the damages the landowner suffers up to the time the court declares a statute invalid because its violates constitutional provisions for payment of just compensation. This was the holding in *Agins* under both the federal and state just compensation clauses. *Id.; see* 26 Am.Jur.2d Eminent Domain § 137 (1996) ("The constitutional requirement of just compensation may not be evaded or

impaired by any form of legislation, and statutes which conflict with the right to just compensation will generally be declared invalid.").

Later, the United States Supreme Court had occasion to review the California rule in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The Court held that invalidation of the offending legislation without compensation for the taking is a constitutionally insufficient remedy for a taking under the Federal Just Compensation Clause. In addition to invalidation, the landowner is entitled to takings damages (temporary taking) that occurred before the ultimate invalidation of the challenged legislation. *Id.* at 319-21, 107 S.Ct. 2388-89, 96 L.Ed.2d at 266-68.

Here the neighbors seek no compensation. Rather, they seek only invalidation of that portion of section 352.11(1)(a) that provides immunity against nuisance suits. We therefore need not concern ourselves with damages for any temporary taking. Accordingly, we hold unconstitutional and invalidate that portion of section 352.11 (1)(a) that provides for immunity against nuisance suits. We reach this result under the Fifth Amendment to the Federal Constitution and also under article I, section 18 of the Iowa Constitution.

We reverse and remand for an order declaring that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force or effect.

We reach this holding with a full recognition of the deference we owe to the General Assembly. That branch of government—with some participation by the executive branch—holds the responsibility to sort through the practical realities and, through the political process, reach consensus in highly controversial public decisions. Those deci-

sions demand our sincere respect. The rule is therefore that "[a] challenger must show beyond a reasonable doubt that the statute violates the constitution and must negate every reasonable basis that might support the statute." *Johnston v. Veterans' Plaza Authority*, 535 N.W.2d 131, 132 (Iowa 1995). The rule finding constitutionality in close cases cannot control the present one, however, because, with all respect, this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.

The same public that constituted the other branches of state government to make political decisions with an eye on economic consequences expects the court to resolve constitutional challenges on a purely legal basis. We recognize that political and economic fallout from our holding will be substantial. But we are convinced our responsibility is clear because the challenged scheme is plainly—we think flagrantly—unconstitutional.

REVERSED AND REMANDED.

All justices concur except LARSON and ANDREASEN, JJ., who take no part.

APPENDIX B

[Filed Jul. 31, 1996]

IN THE IOWA DISTRICT COURT
FOR KOSSUTH COUNTY

CLARENCE BORMANN and CAROLINE BORMANN, Husband and Wife; LEONARD MCGUIRE and CECELIA MCGUIRE, Husband and Wife,

Plaintiffs,

-vs-

THE BOARD OF SUPERVISORS in and for KOSSUTH COUNTY IOWA, and JOE RAHM, AL DUDDING, LAUREL FANTZ, JAMES BLACK and DONALD MCGREGOR, In Their Capacities as Members of the Board of Supervisors,

Defendants.

GERALD GIRRES, JOAN GIRRES, MIKE GIRRES, NORMAN JEAN THUL, GERALD THILGES, SHIRLEY THILGES, THELMA THILGES, EDWIN REDING, RALPH REDING, LORETTA REDING, BERNARD THILGES, JACOB THILGES, JOHN GOECKE and PATRICIA GOECKE,

Intervenors.

FINDINGS, CONCLUSIONS AND JUDGMENT

On the 1st day of April, 1996, the above-captioned proceeding came to the Court's attention pursuant to prior Order. The Plaintiffs appeared by counsel of record, Michael Gabor, the Defendants appeared by counsel of record, David Skilling, Kossuth County Attorney, and the intervenors appeared by counsel of record, Eldon McAfee. The Plaintiffs and Defendants had previously executed and filed a written Stipulation of Facts, and the Defendants had previously made their return of the Writ of

Certiorari, which return and its attachments constitute the record herein. Accordingly, no evidence was received, and this matter was deemed submitted upon the record oral arguments of counsel. The Court has now had an opportunity to examine the factual stipulation, the documents returned with the writ, has had the benefit of the briefs and arguments of the parties, has conducted its own research, and deems itself fully advised and makes the following Findings of Fact, Conclusions and enters the following Judgment.

STATEMENT OF THE CASE

This case is pled in two counts. Count I is a certiorari proceeding and Count II seeks a corresponding declaratory judgment. The Plaintiffs contend and the Defendants and Intervenors deny that the Defendant, Kossuth County Board of Supervisors, acted illegally in approving, on March 30, 1995, the establishment of an "agricultural area" for certain real property owned by the Intervenors in Riverdale Township, Kossuth County, Iowa. Facts necessary to understand the issues before the Court will be stated next below.

FACTS

The parties' stipulated statement of fact filed August 22, 1995 is herein incorporated by this reference and will not be repeated. For present purposes it is enough to note that in September, 1994 Gerald and Joan Girres made application for the establishment of an agricultural area in Riverdale Township which included land owned by them and by Mike Girres, Joan Thul, Norman Thul, Gerald Thilges and Shirley Thilges, Thelma Thilges and Edwin Thilges, Ralph Reding and Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke and Patricia Goecke. The real property involved consisted of 960 acres in Sections 17, 20, 21 and 22 in the said township. Following proper published notice, a hearing was had

before the Defendant Board on November 10, 1994 at which the Board denied the application, finding there were no present or foreseeable non-agricultural development pressures in the area, that the nuisance protections provided by the agricultural area designation would have a direct and permanent impact on the existing and long-held property rights of adjacent property owners and that the policy in favor of agricultural land preservation was outweighed by the policy in favor of the preservation of private property rights.

Thereafter on January 30, 1995, a modified proposal was placed before the board, and on March 14, 1995 was again heard, after proper notice, by the defendant board. On March 30, 1995, in regular session, the defendant board on a 3 to 2 affirmative vote, approved the agricultural area designation.

The transcript of the March 30, 1995 meeting discloses that Supervisor Fantz cast an affirmative vote because: "Um, I guess I feel that the agricultural area law, I really don't like it but it doesn't look like the legislators are going to be doing anything with the law this session. And so for now, I believe that if any of the applicants have followed all the rules and regulations and requirements that an ag area should be granted and I would like to give an example. If a 16 year old goes in to get a driver's license you may not think that he is going to be a responsible driver or you may not like the law, you might think that 16 year olds shouldn't even be allowed to drive, but that 16 year old if they have complied with all the regulations, you would give him a license. And I feel that these people have fulfilled all the legal requirements so therefore I guess I would move that the agricultural area be granted."

The same transcript discloses that Supervisor Dudding cast an affirmative vote because "my decision is based upon the fact that I have had a lot of time to pick up pros and cons on this thing and would you believe the pros and

cons were tied so I flipped a nickel this morning and that is the way I came up with the answers."

Thereafter, a resolution of the Board approving the agricultural area was, as required by statute, recorded in the office of the Kossuth County Recorder.

On April 11, 1995, the Plaintiffs filed their petition for writ of certiorari and for declaratory judgment, challenging the validity of the State statute authorizing creation of the agricultural area, on certain constitutional and common law grounds to be discussed later, seeking a judgment of this Court declaring the board's approval void.

CONCLUSIONS OF LAW
INTRODUCTION

At least since the 1970's increasing public concern has arisen that "America is losing its farm land." Note, *Chapter 93A Right-To-Farm-Protection-For-Iowa,* 35 Drake Law Review, 633 (1985-86). Both State and local governments have adopted a variety of protective measures to minimize the conversion of agricultural land to non-agricultural uses. *Id.* at 634. A legislative response to this perceived problem in Iowa was the Iowa Land Preservation and Use Act. Chapter 93A, Code of Iowa (1985), is now Chapter 352, Code of Iowa (1995). The act as originally adopted provided only for a state land preservation policy. Agricultural areas were not mentioned. 1977 Iowa Acts, 67th General Assembly, Chapter 53, approved June 30, 1977. The act provided for a period of study at both the State and County level, and appears to have resulted in the original version of the present statute. As enacted, two distinct themes are present in this chapter. One is the development and implementation in each county of a land preservation plan and the other is the creation of agricultural areas, defined in Section 3(1) of the act, which regulates land uses within such areas, and provides certain protections as will be noted below. 1982

Iowa Acts, 69th General Assembly, Chapter 1245, approved May 14, 1982.

The legislative findings supporting the latter enactment are expressed in Section 2 of the act, (now Section 352.1, Code of Iowa (1995)). It is recited to be the intent of the General Assembly to provide for the orderly use and development of land and related natural resources in Iowa. The section also recognizes the prominence of agriculture as a major economic activity in Iowa and states that establishment of agricultural areas is so that land inside these areas may be conserved for the production of food, fiber and livestock, "thus assuring the preservation of agriculture as a major factor in the economy of this State."

A prominent legal commentator on agricultural law issues has written:

> The tension between livestock production in the U.S. and the advocation of land use controls, environmental regulations, and nuisance laws has grown in recent years. While new research developments may some day help reduce environmental concerns, several factors may make the issue even more significant in the near future. (Research example omitted.)
>
> Changes under way in the structure of the livestock industry increase the potential for conflict between agriculture and non-farmland uses. Increased public awareness and attention to environmental concerns will place new demands on agriculture to insure animal wastes do not pollute air or water. Local governments are being urged to use land use ordinances to control the location of new livestock facilities. As more non-farm people move into rural areas, the potential for nuisance suits over the effects of farming practices will increase. Neal D. Hamilton, *Nuisance, Land Use Control and Environmental Law*, at 405 (Drake University Agricultural Law Center, 1992).

Justice Schultz has previously stated the precise issue more succinctly: "In this appeal we learn that the utopia of country living can be frustrated by modern farming practices." *Valasek v. Bayer,* 401 NW(2) 33 (Iowa 1987).

In this case, the specific portion of Chapter 352 which is drawn into question is Section 352.11 which provides "incentives for agricultural land preservation-payment of costs and fees in nuisance actions", in the following language:

> "1. Nuisance restriction. (a) A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activity of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in Section 352.9."

Subsequent subsections provide that the foregoing blanket protection is inapplicable if the nuisance results from an operation conducted in violation of a Federal or State statute or rule, or from "negligent" operation of the farm or farm operation. Subsequent legislation has further provided that a nuisance suit may not be brought until a mediaton release is secured under Chapter 654B, and that if a defendant is a prevailing party, the defendant may be awarded attorney fees and costs if the court determines the plaintiff's claim was "frivolous". 1993 Iowa Acts, 75th General Assembly, Chapter 1246, approved May 20, 1993.

The foregoing statutory provision has substantially, although not completely, abrogated ones right to bring a common law nuisance action seeking damages or injunctive relief to abate conditions occurring upon a farm located within a designated agricultural area. The legis-

lative findings and statutory history amply demonstrate a strong and compelling public interest in preserving both agricultural land in general and the quality of the State's agricultural economy in particular. The question before the Court is whether the means adopted by the legislature to so do are consistent with the constitution. Additional claims made by the Plaintiffs are that the Defendant Board acted illegally in adopting the resolution approving the ag area in question here. The specific constitutional claims of the Plaintiffs are:

1. That the statute is violative of Article I, Section I of the Iowa Constitution because it abrogates a common law right to maintain a private nuisance action.

2. That the statute constitutes a "taking" for a non-public use, that is to say, for the benefit of the private farmland owners within the agricultural area.

3. That the statute operates as an exercise of eminent domain without just compensation.

4. That the statute operates as a regulatory taking without just compensation.

5. That the statute operates as a deprivation of property without procedural due process.

The Plaintiffs further claim that there was error or infirmity in the Board action of March 30, 1995, approving the ag area designation, in that: (1) The March approval is barred by the November, 1994 decision to disapprove a substantially similar agricultural area as *res judicata*. (2) The opinion was arbitrary and capricious and therefore illegal. (3) The approval was effected by a legal error, that is, at least one board member believed (contrary to law) that the Board had no discretion to disapprove (and was therefore compelled to approve) the proposed ag area designation.

Each of these contentions will be addressed in turn below.

Before proceeding to address the contentions of the parties, it is appropriate to note that the Plaintiffs' cause of action is stated in two counts. Count one is a certiorari proceeding alleging the constitutional and statutory infirmities noted above, and count two is a declaratory judgment act seeking the same relief. Where violations of basic constitutional safeguards are involved, it is the duty of the Court to make its own evaluation of the facts from the totality of the circumstances. *Hancock v. City Council of Davenport,* 392 NW(2) 472 (Iowa 1986). Illegality of the board's proceedings would be established if the board has acted in violation of a constitutional provision or has not acted in accordance with law. *Id.* The fact that the Plaintiffs have chosen both certiorari and a declaratory judgment proceeding do not change the standard of review nor convert it to an equitable proceeding. The role of this Court is limited to determining whether the inferior tribunal, board or officer, exceeded its proper jurisdiction or otherwise acted illegally. If it is found that the statute implemented by the Board in this case is unconstitutional then illegality will be established.

STANDARD OF REVIEW

It is also worthy of note that the Plaintiffs are making a facial challenge to Section 352.11. It is not alleged that any of the Intervenors are at this time maintaining a nuisance upon their premises, and under these circumstances, the Plaintiffs have assumed a particularly heavy burden. In a similar circumstance the U.S. Supreme Court has said:

> Because appellee's taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning whether application of the Act to particular surface mining operations or its effect upon specific parcels of land. Thus, the only issue properly before the district court and, in turn, this court, is whether the "mere enactment" of the

> Surface Mining Act constitutes a taking. (citation omitted). The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land. . . ." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 69 L.Ed.2d 1, 101 S.Ct. 2352 (1981).
>
> Plaintiffs in such a position have been said to face "an uphill battle." *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993).
>
> The standard for showing that a zoning restriction is facially invalid is "very high." *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D. Nev. 1992).
>
> The most frequently cited case for the foregoing propositions is *Agin v. City of Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, S.Ct. 2138 (1980), where the court said: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." 447 U.S. at 260.

The statute challenged in this case, as noted above, substantially restricts the rights of adjoining land owners to prosecute a cause of action for the maintenance of a private nuisance against persons operating a farm within the defined agricultural area. It is worthy first to examine the nature of a nuisance cause of action in order to fully understand what the Plaintiffs claim to have been abrogated.

Although Chapter 657 statutorily defines nuisances to include "whatever is . . . offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary

proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof." These statutory definitions do not modify the common law rule applicable to nuisances. "Another well established rule is that one must use his own property so that his neighbor's comfortable and reasonable use and enjoyment of his estate will not be unreasonably interfered with or disturbed. *Schlotefelt v. Vinton Farmers' Supply Co.*, 252 Iowa 1102, 1107-08, 109 NW2d 695 (1961). The essential test is said to be the "reasonableness of conducting it (the operation involved) in the manner, at the place and under the circumstances in question." *Ritter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 NW2d 151 (1957).

Our Supreme Court has recognized a distinction between a trespass and a private nuisance. "Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors. It usually involves the idea of continuance or recurrence over a considerable period of time. The line of demarcation between private nuisance and trespass is not always clear. Under certain circumstances, such as in some cases involving the flooding of land, there may be both a trespass and a nuisance. In some instances trespasses of continuing character have been dealt with as nuisances." *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 NW2d 435 (1942).

To be distinguished are the concepts of nuisances and negligence. Negligence is a type of liability-forming conduct. A private nuisance is a tort. It is a substantial and unreasonable interference with the interest of a private person in the use and enjoyment of his land. It has been called a type of harm. Although negligence may accompany the creating of a nuisance, many invasions are intentional, and continuing conduct resulting in continuing or recurrent invasions, after the actor knows the invasions are resulting, is always intentional. Many authorities hold that any unreasonable or unlawful use of property which

unreasonably interferes with the lawful use and enjoyment of other property is an actionable nuisance; that negligence is not an essential or material element of such an action, and that the actor is, as a rule, liable for the resulting injury to others, notwithstanding his exercise of skill and care to avoid such injury. A nuisance may be found to exist even though the person so accused has used the "highest possible degree of care to prevent or minimize the deleterious effects." *Bowman v. Humphrey,* 132 Iowa 234, 109 NW 714 (1906).

By substantially restricting the rights of the Plaintiffs to in the future maintain an action alleging a private nuisance against the farm operators within the approved ag area, the legislature has therefore diminished the Plaintiffs' ability to protect their own interest in the reasonable and peaceable enjoyment of their own real property. It is to be noted, however, that the abrogation is not complete. The protection accorded the Intervenors is available to them unless: (1) A nuisance results from a farm operation determined to be in violation of a Federal statute or State statute or rule; (2) It results from the negligent operation of the farm or farm operation; (3) From an action or proceeding arising from injury or damage to a person or property caused by the farm or farm operation before the creation of the agricultural area; or (4) From a right to recover damages because of the pollution or changing condition of the water of a stream, the overflowing of a person's land, or excessive soil erosion onto another person's land, unless caused by an act of God.

With the foregoing in mind, the Court will now turn to the specific allegations of the Plaintffs.

IOWA CONSTITUTION, ARTICLE I, SECTION I

The Iowa Constitution, Article I, Section I, provides:

> All men are, by nature, free and equal, and have certain inalienable rights—among which are those of

> enjoying and defending life and liberty, requiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

The Plaintiffs' position, simply stated, is that, without resort to self-help, the remedy, constitutionally provided, and by the common law, to "protect property" is the maintenance of a common law nuisance action, and that the impairment of that right by the legislature is unconstitutional in violation of the quoted section of the Iowa Constitution.

The stated constitutional provision has been before the Iowa Supreme Court in two principal cases cited by the Plaintiffs in support of their proposition.

The first is *State v. Ward*, 170 Iowa 185, 152 NW 501 (1915), where, in an apparent test case, the Defendant Ward shot and killed a deer contrary to statute. The deer was shot while engaged in the consumption of livestock fodder owned by the defendant. He insisted that although the deer was killed contrary to statute, he was entitled to slay the deer in order to protect his property, and the Iowa Supreme Court agreed. Citing Article I, Section I of the Iowa Constitution, the court said: "By way of analogy, we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of a human being. We see no fair reason for holding that the same plea may not be interposed in justification of the killing of a goat or a deer." Accordingly, although the relevant statute prohibiting the killing of deer contained no exception applicable to the defendant, the court by construction found such a right to exist.

Article I, Section I was also before the Court in *May's Drug Stores v. State Tax Commission*, 242 Iowa 319, 45 NW2d 245 (1951). At the time, an Iowa statute made it unlawful to sell cigarettes at less than cost. The plaintiffs contended that among the rights possessed by an owner of property, such as cigarettes, was the right to sell

them at any price the owner might deem best. Rejecting this argument, the court said:

> "It is asserted . . (the statute) . . violates Section I, Article I of the State constitution which preserves to all men the "inalienable" right of "possessing and protecting property." The argument is that right of the owner to sell property at any price he sees fit is a valuable property right—one that is inherent in property ownership—and the above constitutional provision preserved this right to plaintiff and the act in question seeks to take it away. . . . The property rights preserved by the above constitutional provisions are subject to the higher and greater right known as the public welfare. The property right which is secured by this section of the constitution is the pre-existing common law right, and both this section and the due process clause . . . exclude arbitrary restrictions on property rights."

In *May*, the Supreme Court found the *act* to be constitutional, finding the stated public purpose, the preservation of small independent retailers, was a sufficient public purpose to sustain the act.

The court added: "The police power is an incident of title to private property, and it is no objection to its reasonable exercise if private property is impaired in value or otherwise adversely affected."

Among the secondary authorities cited by the Plaintiffs for the proposition that a common law right to maintain a private nuisance action is part and parcel of the language of Article I, Section I, is a law review article, *Kempkes, the Natural Rights Clause of the Iowa Constitution: When The Law Sits Too Tight*, 42 Drake L. Rev. 593 (1993). The author traces the history of Article I, Section I of the Iowa Constitution, proposes it as a source of individual constitutional rights, independent of other portions of the State and Federal Constitutions, to protect individual rights from "unwarranted governmental inter-

ference." At footnote 21, at page 599, the author concedes: "This Article does not address issues arising out of legislation affecting an individual's economic or property rights, a broad area in which courts have traditionally accorded legislatures wide latitude for experimenting to promote the public welfare." While the Court has read the quoted Article with much interest, given the author's own disclaimer, the Court concludes that any expansive reading to be accorded the same, will have to await action by our highest court.

In summary upon this point, the Court concludes that the challenged legislation does not infringe Article I, Section I of the Iowa Constitution.

TAKING FOR PRIVATE USE

The Plaintiffs contend that the challenged legislation affects a taking of their private property solely for the benefit of adjoining land owners in an agricultural area, and not for any purported public use. As such their argument is grounded in the Fifth Amendment to the Federal Constitution and Article I, Section 18 of the Iowa Constitution. The most widely cited Iowa Supreme Court opinion on this topic is *Simpson v. Low-Rent Housing Agency of Mount Ayr,* 224 NW2d 624 (Iowa 1974). The Court there set out certain principles which will now be repeated:

> 1. The power of eminent domain cannot be utilized for the purpose of taking private property from one person for the private use of another.
>
> 2. The power of eminent domain can be exercised only for a public use or purpose.
>
> 3. The foregoing propositions are implied from the language of Article I, Section 18 of the Iowa Constitution which provides: "Private property shall not be taken for public use without just compensation. . . ."

4. It is for the legislature to initially determine whether condemnation of private property is for a public use.

5. Where the General Assembly declares a use to be public in nature, there exists an attendant presumption of constitutionality with which the judiciary will not interfere unless the purpose is clearly, plainly and manifestly of a private character. Every reasonable intentment must be indulged in favor of a statutory enactment.

6. It is for the courts, however, to ultimately determine whether a taking by eminent domain is for a public purpose when constitutionality of the foundational statute is challenged. The court is not required to treat a legislative declaration of purpose as final, binding or conclusive.

The specific holding in *Simpson* was that statutory authorization for public authorities to condemn private land, and then convey it to a private non-profit corporation to develop subsidized rental apartments was for a public use.

A statutory scheme was adopted in Hawaii in order to end a land oligopoly pursuant to which a public agency would condemn privately held land, and then under the statutory procedure re-sell the land to the private tenants in possession thereof. A challenge to this scheme was mounted under the 5th Amendment to the U.S. Constitution, alleging that the purpose was wholly private: to take land from owner A and convey it to owner B. The 9th Circuit Court of Appeals agreed, but a unanimous U.S. Supreme Court reversed. The court held that the breaking up of this extreme concentration of private land ownership, which had resulted in a gross distortion of market prices in Hawaii, was within the province of the legislature to accomplish and was not a taking for a private use. The court said: "There is of course a role for courts to

play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the court in *Berman* made clear that it is a frequently "narrow one." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 81 L.Ed.2d 186, 104 S.Ct. 2321 (1984).

Deference to the legislature's public use determination is required until it is shown to involve an impossibility. *Id.* The court added: "But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the public use clause." The court expressly rejected the proposition that the government must possess and use property at some point during the taking. The mere fact that property was taken by eminent domain and later transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. It is not essential that the entire communty, nor even any considerable portion, directly enjoy or participate in any improvement in order for it to constitute a public use. Finally, State legislation like that of Congress, is entitled to judicial deference.

In this case, the gist of the Plaintiffs-argument is that a burden is placed upon the Plaintiffs as neighbors to an ag area which burden is not visited upon the entire community. As such, they say that their property rights (i.e. the maintenance of a private nuisance action) is infringed not for any public benefit but for the private benefit for the land owner within the ag area. However, under the standards enunciated above, the legislature's judgment (that the greater good of all Iowans is served by a robust agricultural economy, and that a certain "freedom to farm" is required in order to foster this goal) is rationally related to a proper public purpose, although private land owners are incidentally benefited by the procedure. The Plaintiffs' argument to the contrary must fail.

TAKING WITHOUT JUST COMPENSATION
A. PHYSICAL INVASION

As noted above, the state and federal constitutions prohibit the taking of private property for public use without just compensation. The first question is whether a "taking" has occurred, and one method of government "taking" which requires just compensation is a physical invasion of the property of another. Where less than a complete taking is involved, the Court's analysis under the first prong of its takings law is whether the property owner has been required to suffer some physical invasion.

Illustrative of takings cases in which a physical invasion is involved is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982). In *Loretto* a New York statute required a landlord to permit, with one dollar of compensation, the invasion of the landlord's apartment building in order to permit cable television installation for the benefit of the tenants. As it applied to the plantiff, the landlord was required to permit installation of cable of about one-half inch diameter for approximately 30 feet in length along the top of its building, which invasion would certainly seem to be slight at best. The Supreme Court held, however, that the actual physical invasion by installation of the wires and small connecting boxes, was an actual physical invasion which required just compensation under the 5th Amendment. The court said: "When faced with a constitutional challenge to a permanent physical occupation of real property, this court has invariably found a taking." In its analysis, the U.S. Supreme Court reasoned from "flooding" cases where government action inundated a land owner's property with water. The court noted a clear distinction was drawn between permanent physical occupation, in cases involving a more temporary invasion or government action causing consequential damage within the property of another based on government activity occur-

ring outside the property. The court noted that it has always found a taking only in the case of the permanent invasion.

Applying this analysis to the facts at hand, it is first noted that *Ryan v. City of Emmetsburg,* supra, draws a distinction between physical invasion, characterized as a trespass in *Ryan,* and nuisance which is intangible invasion. In this case, the intangible invasion does not rise to the level of an actual physical occupation such as to constitute a taking. Finding no invasion and therefore no taking, the Court will next turn to the second prong of Supreme Court takings cases.

B. REGULATORY TAKING

Although no physical invasion is involved, the Supreme Court has recognized that a taking may occur where regulations are so comprehensive and burdensome as to deprive a private land owner of all economically viable use of property. The Supreme Court recognizes that if the government prohibits all beneficial economic activity upon a parcel of real estate, even though the government does not invade the same, or physically oust the owner from the property, a taking has occurred. In *Nolan v. California Coastal Commission,* 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), the Supreme Court held that a California scheme which conditioned a building permit to construct a permanent home on a certain stretch of California beach front upon the owner granting a public easement for use of the beach in front of the property was unconstitutional. Justice Scala found no connection between the purported purpose of the requirement, to increase access to the sea, to the requirement of the giving of the easement. On the contrary, the Supreme Court found it was actually an authorized physical invasion rather than an appropriate government regulation. While noting that land use regulation does not affect a taking if it "substantially advances

legitimate state interests" and does not "deny an owner economically viable use of his land" if there is no such connection, the taking has occurred which must be compensated. In *First Lutheran Church v. Los Angeles County,* 482 U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987), the U.S. Supreme Court held that an emergency order entered which prohibited the plaintiff church from operating a campground near a river subject to flooding was a "temporary" taking which required compensation.

In *Lucas v. South Carolina Costal Council,* 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992), a South Carolina statutory plan authorized creation of a beach front management area which required property owned by the plaintiff to be left free of any permanent structure. As in the above cases, the government made no physical invasion of the plaintiff's property but it was found the regulations had the effect of destroying all reasonable economic benefit to be gained from the property. The court summarized its holdings: "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrific *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

Under the teaching of the cases described above, it is quite clear that the statutory procedure alleged in this case which, it may be assumed, may require the Plaintiffs to suffer what they say will be odors generated by farming activities in the agricultural area, assuming lack of negligence and affirmative compliance with State and Federal regulations, is not such as to totally deprive the Plaintiffs of all economically advantageous use of their properties. It is conceivable that a situation could be imagined which might approach such a result, but where the challenge to the statute is upon its face and not as applied in a concrete set of facts, this Court has no difficulty in deter-

mining that a regulatory taking has not occurred. The Supreme Court has been markedly disinclined to find a regulatory taking where only one or two sticks in the "bundle of rights" that are part and parcel of the ownership of real property have been impaired, no regulatory taking has occurred. Thus, in *Yee v. City of Escondido*, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992), the Supreme Court approved, over a takings challenge, a California statutory provision which authorized the City of Escondido to regulate rentals in mobile home parks.

In this case, the challenged legislation impairs but does not eliminate one of the many "sticks" in the bundle of rights, and as in *Yee v. Escondido,* above, represents the legislature's judgment in adjusting property rights, but does not amount to a taking. The Plantiffs' claim to the contrary fails.

PROCEDURAL DUE PROCESS

The plaintiffs contend that they were deprived of procedural due process in the course of the process outlined in the Statement of Facts above. As appears below, the Court has determined that in approving the agricultural area designation, the board of supervisors was acting in a legislative capacity. This finding compels the conclusion that due process was served by the statutorily required comment-argument type hearing which was conducted in this case. *Montgomery v. Bremer County Board of Supervisors,* 299 N.W.2d 687 (Iowa 1980).

NUISANCE VERSUS FIFTH AMENDMENT TAKING

The foregoing discussion amply demonstrates that the partial statutory abrogation of an adjoining landowner's right to bring a common law nuisance suit against a farmer operating within an ag area does not by any means fit neatly within traditional, well-defined methods of analysis for Fifth Amendment takings. Indeed the Court has

determined that none directly apply. As appears below, it is said to be the majority rule that the legislature cannot authorize the maintenance of a nuisance without compensation. The Court will below examine authorities so saying in some detail.

58 Am Jur2d *Nuisances* Section 462 *et. seq.* (1989), discusses the extent to which legislative authorization may constitute a defense in a suit alleging the maintenance of a private nuisance. Section 463 provides in part:

> The legislature, generally, may legalize, insofar as the public is concerned, what would otherwise be a public nuisance, and, according to some courts, may legalize what would otherwise be private nuisances, so as to prevent the recovery of damages or relief by way of injunction on account of them, although the weight of authority is to the contrary.

Section 464 elaborates on the foregoing and provides:

> The state has power to legalize, insofar as the public is concerned, what would otherwise be a public nuisance, and within constitutional limitations it may make lawful things that were nuisances, even though, by doing so, the use or value of the property is affected.

Section 465, while acknowledging a minority rule to the contrary, says:

> According to the weight of authority, however, what is authorized by law may be a private nuisance, and the legislative authorization in this regard does not affect any claim of a private citizen for damages for any special inconvenience and discomfort caused by the authorized act not experienced by the public at large, or for an injunction.
>
> Furthermore, under constitutional provisions against the taking of damaging of private property without compensation, the legislature cannot authorize the

> maintenance of a nuisance without compensation to individuals whose property is destroyed or injured thereby, and legislative authority will not exempt the person to whom it is granted from liability for such compensation.

Section 466 provides generally that where statutory exemption or immunity from maintenance of a nuisance cause of action is granted, the granting of immunity is strictly construed. Further, it is not presumed the legislature intended to authorize the creation of the nuisance, unless the offensive conduct is the natural and necessary result of an exercise of the power conferred. Section 467 elaborates on the foregoing and says that the granting of government permits, including zoning permits, will not be construed as an authorization for the creation of a nuisance, nor immunize the same. Section 469 is essentially the safe affect.

26 Am Jur2d *Eminent Domain* Section 145 (1996), provides in part:

> Thus, property is taken by the government in the sense of the provision of the Fifth Amendment . . . when inroads are made upon an owner's use of it to an extent that as between private parties, a servitude has been acquired either by agreement or in course of time.

Later:

> Thus, a taking of property for which compensation must be paid may not require an actual physical taking or appropriation of the fee simple, but may consist of an interference with the rights of ownership, use, and enjoyment, or any other rights incident to property.

Among the authorities cited for the latter proposition is *Hunziker v. State*, 519 NW2d 367 (Iowa 1994).

Iowa law appears to conform to much of the foregoing. In *State v. Moffett,* 1 Iowa (Greene) 247 (1848), the defendant and others were indicted for damaging a mill dam. The defense was that the existence of the dam caused ponding of water which injured the defendant's own water wheel, that the dam thus created a nuisance, which the defendant had a common law right to abate. The statute under which the defendants were charged made it illegal to injure a mill dam, and the prosecution claimed that the criminal statute abrogated the defendant's common law right to abate the nuisance. The Supreme Court concluded:

> There is nothing in our statute, express or implied, excluding remedies which existed before the statute was passed. One of these remedies was abatement of a nuisance; and in the absence of a statute taking this remedy away, it remained preserved. (emphasis supplied).

It thus appears that the court in *Moffett* was merely holding that the criminal statute did not abrogate the right to abate the nuisance, its holding being qualified that "in the absence of a statute taking this remedy away" the remedy remained.

In *Miller v. City of Webster City,* 94 Iowa 162 (1895), the plaintiff sought abatement of a city market created by the city pursuant to statute, where livestock was brought to be weighed and traded. The market area was across the street from the plaintiff's residence. He complained of the odor, noise, dust and the like generated by the animals so confined. The Supreme Court noted that the market was placed under the authority of statute, and said:

> Being so authorized they are not public nuisances; for the rule, as we understand it, is where a municipal corporation is authorized to do a particular thing, so long as it keeps within the scope of the power

> granted, it is protected from proceedings on behalf of the public, subject possibly to this qualification that the nuisance, if any, arises as a natural and probable result of the act authorized, so that it may fairly be said to be covered, in legal contemplation, by the legislation conferring the power. If the nuisance is not the necessary result of the act authorized, or if it might be exercised in such a manner as to obviate the nuisance, legislative authority will not be inferred from the grant, to create the nuisance, and it will not bar proceedinngs to abate it.

In *Payne v. Town of Wayland,* 131 Iowa 659 (1906), the plaintiff sought to enjoin the city from using certain property as a cemetery. The court discussed the fact that the city was authorized by statute to establish and maintain a cemetery, and said:

> We need not now discuss the power of the legislature to itself create, or to authorize another to create, a private nuisance without compensation to the injured party; for it is evident that no such power is conferred by our statute.

The Iowa Supreme Court appears not yet to have answered the question left open in the *Payne* decision.

The foregoing demonstrates, however, that our State appears to be in the mainstream as described in the American Jurisprudence citations noted above.

In *Baltimore and Potomac R.R. Co. v. Fifth Baptist Church,* 27 L.Ed. 739, 108 U.S. 317, 2 S.C. 719 (1882), the church brought suit for damages caused by the dust, smoke and noise generated by the railroad company's engine house and repair shop. The facility had been located under grant of authority from Congress and claimed this as a defense. The Supreme Court held that the grant of authority was "no answer to the action of the plaintiff," saying: "It admits indeed of grave doubt whether Congress

could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from liability to sue for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others property to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyances."

Thus, while appearing to state an absolute rule, where the deprivation is less than a taking of the whole, the court entered into a consideration of whether alternate means and methods could have been employed which would not have caused the discomfort and annoyance.

Later, in *Richards v. Washington Terminal Co.*, 233 U.S. 546, 58 L.Ed 1088, 34 S.Ct. 654 (1914), the plaintiff brought suit against the defendant for smoke, dust, noise and vibration caused by the operation of the railroad through a tunnel which opened near the plaintiff's property. The court distinguished British authority and said:

> "We deem the true rule under the Fifth Amendment, as under State constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.

Thereafter, the court posed this question "what is to be deemed a private nuisance such as amounts to a taking of property?" The answer was that railroads are not to be subject to damages "in the absence of negligence." Thus, while appearing to state an absolute rule, the court examined the record looking for negligence, and reversed a judgment rendered for the plaintiff and remanded for an allocation of damages purely the result of negligence, while disallowing damages naturally incident to the operation of the railroad.

Other cases relied upon by the American Jurisprudence editors to support what is said to be the majority rule as described in Section 465, and discussed above, while appearing to state an absolute rule each are based upon a finding of either negligence, improper siting, or are dicta. *Yaffe v. Ft. Smith* 178 Ark, 406, 10 SW2d 886, 61 A.L.R. 1138 (1928); *Steele v. Queen City Broadcasting Company,* 341 P2d 499 (Wash. 1959). In *Yaffe,* there was evidence of negligent and improper operation of a junk yard which was found to be a nuisance and in *Steele* the court's statement was dicta, as the court found that the government authority to build the offending television tower was improperly granted.

Some courts have disregarded the foregoing authorities completely and have held flatly that a facility or activity authorized by Congress or a Federal instrumentality cannot constitute a nuisance at all. *Potomac River Association, Inc. v. Lundberg Maryland Seamanship School, Inc.,* 402 F.Supp. 344 (D.Maryland 1975) ("the corps may immunize acts which would otherwise be nuisances in much the same way as zoning under a state's police power may cause some curtailment of rights by restricting uses"; corps of engineers authorized defendant to dredge and fill land along a navigable creek to plaintiff's damage.); *State of Mo. Ex. Rel. Ashcroft v. Dept. of Army, Etc.,* 526 F.Supp. 660 (WD Mo, 1980) ("the court will not hold conduct to constitute a nuisance where authority

therefore exists by virtue of legislative enactment." Hydro-electric plant not a nuisance).

In *McMahon v. City of Dubuque,* 255 F.2d 154 (8th Cir., 1958), an allegation that the exercise of zoning powers operated as a taking, the court noted: "Every zoning regulation affects property already owned by individuals and causes some curtailment of the rights of such owners by restricting prospective uses. Thus it may be said to lay an uncompensated burden upon some property owners. However, this is not regarded as depriving the owner of his property or such use of it as he may desire to make. It is merely a restraint upon the use of it for the protection of the general well-being, that is, to prevent harm to the public." *Id.* at 160.

In analyzing the foregoing, it appears that while the pending dispute is unique, counsel having cited no cases on point and the Court's own research revealing none, it is far from unknown in Iowa and American jurisprudence that legislature or congress may determine that a facility or activity is so important for the general public good that some detriment and burden by affected property owners must be borne by them, uncompensated.

The legislative declaration contained in Section 352.1, Code of Iowa (1995) recognizing the importance of agriculture in the Iowa economy conforms with the view judicially noted by the Iowa Supreme Court that agriculture is our "leading industry". *Benschoter v. Hakes,* 232 Iowa 1354, 8 NW2d 481 (1943).

A common thread running through the cases cited above and cases read but not cited by this Court is that certain public improvements and activities are so important that they simply must occur. The analysis given is often focused upon whether the given facility or activity was improperly placed, or was negligently operated, and under this analysis, a wide variety of important commercial activities, invested with substantial public interest, have

been permitted to occur, although adjoining neighbors might suffer thereby. These have included oil refineries, railroad tracks, railroad repair yards, hydroelectric dams, levies, television towers and the like. Given the legislative and judicial recognition of the importance of agriculture in our economy, farming activities including livestock production must be included with the foregoing.

As noted first above, the Plaintiffs make a facial attack against Section 352.11. The foregoing discussion makes clear that the facial attack, under the standard of analysis described first above, must fail. Whether the operation of a farming enterprise in an agricultural area in the future, absent negligence and in conformity with State and Federal environmental regulations could rise, as applied, to a nuisance and a "taking" under the Fifth Amendment, cannot now be decided.

RES JUDICATA

With the constitutional objections to the mentioned statute resolved, the Court now turns to the non-constitutional arguments advanced by the Plaintiffs and first addresses the claim that the November, 1994 denial of the ag area designation by the board is res judicata.

The plaintiffs correctly say that the doctrine of res judicata may apply to a tribunal, not a court, which exercises judicial functions. The doctrine of res judicata serves the salutory purpose of preventing repetitive litigation over issues which have previously been finally determined by a judicial or quasi-judicial body. It means "the thing is decided." It is applicable to an administrative adjudication if and only if the performing officer or body is acting in a quasi-judicial capacity. *Board of Supervisors, Carroll County v. Chicago & Northwest Transp. Co.*, 260 NW2d 813 (Iowa 1977).

In a closely analogous proceeding involving a rezoning request, the Supreme Court held that while under a county or city zoning procedure, the board of adjustment is a

quasi-judicial body, in considering a rezoning request or an amendment to a zoning ordinance, the board of supervisors or city council sits not in a judicial capacity but in a legislative capacity. *Montgomery v. Bremer County Board of Supervisors,* 299 NW2d 687 (Iowa 1980). In this case, the board of supervisors is statutorily required to conduct a comment-argument type of hearing of which the public is required to have advance notice. Like the board in *Montgomery,* however, the hearing here did not include cross-examination, evidence was not taken under oath, and the Court concludes that the Board was acting in a legislative and not a quasi-judicial capacity in passing upon the ag area petition. Since the Board of Supervisors was not acting in a quasi-judicial capactiy, it follows the principles of res judicata do not apply.

ARBITRARY AND CAPRICIOUS

"A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functons, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." Iowa Rule of Civil Procedure 306; *Frank Hardy Advertising, Inc. v. City of Dubuque Zoning Board of Adjustment,* 501 NW2d 521, 523 (Iowa 1993). "In certiorari it is neither the function nor the privilege of the court to pass upon the wisdom or soundness of an inferior tribunal's discretion, but its review is restricted to jurisdiction and legality." *Smith v. City of Fort Dodge,* 160 NW 2d 492, 498 (Iowa 1968). An illegality is established if the inferior tribunal has not acted in accordance with a statute, if its decision was not supported by substantial evidence, or if its actions were unreasonable, arbitrary, or capricious. *Asmann v. Board of Trustees of Police Retirement Sys.,* 345 NW2d 136, 138 (Iowa 1984). The plaintiff in a certiorari action challenging the action was illegal. *Norland v. Worth County Compensation Board,* 323 NW2d 251, 252 (Iowa 1982). A finding of "illegality" as described above does not require or suggest a finding

that the board or its members acted in bad faith. It is merely the word chosen by the law to describe the circumstance in which the particular tribunal's action cannot be permitted to stand. The Iowa Supreme Court has observed:

> "(It) does not imply a bad motive, or a wrongful purpose or perversity, passion, prejudice, partiality, moral delinquency, willful misconduct or intentional wrong. We shall not undertake to formulate a general definition of the term 'abuse of discretion'. It does not imply reproach."

In this case one Board member indicated he voted affirmatively in favor of the establishment of the agricultural area after having weighed the arguments and found them to be equal, he flipped a coin. Another Supervisor analogized with the granting of a driver's license, and felt that the Board had no discretion to permit or deny the establishment of an agricultural area so long as the application was in proper form, the Board was compelled to approve it.

The Attorney General has ruled, however, that the Board does have discretion to consider whether in the words of the statute, the establishment of an agricultural area would be inconsistent with the purposes of this chapter with reference to the statement of purposes contained in Section 352.1. The Attorney General has ruled, correctly in the opinion of this Court, that the Board does have discretion to reject a proposed agricultural area upon a specific finding that the policy in favor of agricultural land preservation is in a given case outweighed by other policy considerations set forth in the chapter. Opinion of the Attorney General (Weeg to Beine, Cedar County Attorney, February 9, 1983) Opinion No. 83-2-5. The words of Section 352.7(2) say the Board "shall adopt" the proposal or any modification "unless to do so would be inconsistent with the purposes of this chapter." The foregoing

language obviously invests the Board with discretion, and also imposes a duty to make appropriate inquiry at the hearing as to whether the "purposes of the act" are served or not served by granting the petition. Although speaking in a different context, in reference to judicial discretion, the Supreme Court has said that that discretion must be exercised. A prominent Iowa judge has said: "When the trial court has discretion, the judge must recognize and exercise it, and failure to do either is reviewable." Fagg, *A Judge's View of Trial Practice,* 28 Drake L.Rev. 1 (1978-79).

The Supreme Court has said:

> A refusal or failure to exercise discretion will not be affirmed by demonstrating that the result reached could have been the same upon the exercise of the withheld discretion (citation is omitted) because the trial court had discretion to either allow or disallow the motion for production it was required to exercise it. The duty to exercise discretion was not discharged. *Sullivan v. Chicago & Northwestern Transportation Co.,* 326 N.W.2d 320 (Iowa 1982).
>
> See also *State v. Hildebrand,* 280 N.W.2d 393 (Iowa 1979).

While the Court is sympathetic to the position of the Board of Supervisors, and is somewhat inclined to believe that the Supervisor who says he "flipped a nickel" was being facetious, the Court cannot ignore nor sanction public action decided by chance. That is the very definition of "capricious". Further, the act appears to vest discretion in the Board and require its prudent exercise. To falsely believe that one has no discretion is also arbitrary and capricious. The action of the Board must be annulled and this matter remanded to be considered again by the Board, after proper statutory notice, guided by this opinion, and that of the Attorney General.

SUMMARY

The Court summarizes its Findings as follows:

1. Section 352.11 is not unconstitutional in violation of Article I, Section I of the Iowa Constitution.

2. Although finding that no taking has occurred, the Court finds and concludes that any taking that has occurred is for a public use and not a private use.

3. No physical taking without just compensation has occurred and Section 352.11 does not therefore violate the Fifth Amendment proscription.

4. No regulatory taking has occurred in violation of the Fifth Amendment prohibition.

5. The hearing contemplated by Section 352.11 provided appropriate procedural due process.

6. In passing upon the agricultural area petition, the Board acted in a legislative and not quasi-judicial capacity and subsequent action after prior disapproval is not barred by the doctrine of res judicata.

7. The votes of two Supervisors were accompanied by such error or infirmity that the final Board action approving the agricultural area in question here is arbitrary and capricious and must therefore be annulled.

JUDGMENT

IT IS THE ORDER, JUDGMENT AND DECREE of the Court as follows:

1. The foregoing summary of Findings is herein incorporated by this reference.

2. The writ of certiorari is sustained in that the error or infirmity in the Board's action has been demonstrated, and this matter must be and is hereby ORDERED remanded to the Kossuth County Board of Supervisors for further proceedings as provided by law.

3. The costs of this action to be taxed by the Clerk in the sum of $115.00 are hereby taxed against and shall be paid by the Defendants.

SO ORDERED this 30th day of July, 1996.

/s/ Patrick M. Carr
PATRICK M. CARR, Judge
Third Judicial District of Iowa

APPENDIX C

[Filed Dec. 2, 1996]

IN THE IOWA DISTRICT COURT
FOR KOSSUTH COUNTY

Law No. 23313

CLARENCE BORMANN and CAROLINE BORMANN, Husband and Wife; LEONARD MCGUIRE (deceased) and CECELIA MCGUIRE, Husband and Wife,

Plaintiffs,

-vs-

THE BOARD OF SUPERVISORS IN AND FOR KOSSUTH COUNTY, IOWA, and JOE RAHM, AL DUDDING, LAUREL FANTZ, JAMES BLACK and DONALD MCGREGOR, In their Capacities as Members of the Board of Supervisors,

Defendants.

GERALD GIRRES, JOAN GIRRES, MIKE GIRRES, NORMA JEAN THUL, JERALD THILGES, SHIRLEY THILGES, THELMA THILGES, EDWIN READING, RALPH READING, LORETTA READING, BERNARD THILGES, JACOB THILGES, JOHN GOECKE, and PATRICIA GOEKE,

Intervenors.

ORDER OF COURT UPON RULE 179(b) MOTION

On July 31, 1996, the Court filed its Findings, Conclusions and Judgment in the above proceeding. On August 8, 1996, the Plaintiffs filed a Motion for Enlargement, Amendment, Modification, Or Substitiution of Conclusions under I.R.C.P. 179(b). At the suggestion of counsel, the Court deferred ruling on the same in anticipa-

tion of the receipt of an opinion by the Iowa Supreme Court in *Weinhold v. Wolff,* —— NW(2) —— (Iowa 1996) (Supreme Court No. 94-1589, filed October 23, 1996). That opinion has now been received and considered. The opinion contains language capable of supporting the position of each party, but the language noted is not central to the Court's opinion. The Court has also received and studied the Plaintiffs' memorandum. Deeming itself fully advised the Court enters the following order.

It should be first stated that the issues framed by the pleadings in this case presented novel, difficult and close issues for judicial determination, which the parties have vigorously and ably contested. The Court's Judgment filed July 31, 1996 represented its best judgment as to the issues thus presented. With this in mind, the Court turns to the two specific issues raised by the Plaintiffs' motion.

I

The Plaintiffs' first inquiry questions the harmony of the Court's reading of the *May's Drug Stores v. State Tax Commission,* 242 Iowa 319, 45 (NW(2) 245 (1951), and *State v. Ward,* 170 Iowa 185, 152 NW 501 (1915). Simply stated, the Court was unable to extrapolate from *State v. Ward* the proposition for which it was cited, that the legislature may not constitutionally limit a property owner's right to bring a common law nuisance action. The Court concludes that the fact-based decisions in *Baltimore and Potomac R.R. Co. v. Fifth Baptist Church,* 108 U.S. 317 (1882) and *Richards v. Washington Terminal Co.,* 233 U.S. 546 (1914), rested, as did the legislative determination in enacting the statute under attack, upon an inquiry weighing the burden visited upon adjacent owners against the negligent siting and operation of the offending improvements. The Court concluded that this requires an ad hoc, fact-based inquiry not capable of determination in this proceeding.

II

In *Nollan v. California Costal Commission,* 483 U.S. 825 (1987), the statutory scheme found unconstitutional required the property owner affected to suffer a physical invasion of his property as a condition of receiving a building permit. In this case, the physical invasion is not required or authorized. The Iowa Supreme Court has drawn this distinction. *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 NW(2) 435 (1942). The Plaintiffs again draw the Court's attention to *Churchill v. Burlington Water Company,* 94 Iowa 89, 62 N.W. 646 (1895). They argue with some logic that the uncompensated taking of an easement which would authorize a physical invasion as in *Nollan* is not much different from the effect of the statute *sub judice* which they say requires adjoining property owners to give an uncompensated nuisance or "pollution" easement. The distinction is indeed thin. Given the strong presumption of constitutionality accorded legislative enactments, and in light of the similar distinction drawn by the Supreme Court in such cases as *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), the court is constrained to find the statute constitutional upon facial attack.

Based on the foregoing, IT IS ORDERED that the Rule 179(b) Motion is hereby overruled as to each asserted ground.

SO ORDERED this 30th day of November, 1996.

/s/ Patrick M. Carr
PATRICK M. CARR, Judge
Third Judicial District of Iowa

APPENDIX D

KOSSUTH COUNTY BOARD OF SUPERVISORS

On February 7, 1995, a Ag Area Petition was filed with the Kossuth County Board of Supervisors, heard by public hearing on the 14th day of March 1995, and approved. An appeal was taken, the Iowa District Court in its Findings, Conclusions and Judgement, stated the previous action of the Board of Supervisors must be annulled, and this matter remanded to be considered again by the Board, after proper statutory notice, guided by this opinion, and that of the Attorney General. On September 3rd, 1996, pursuant to Iowa Code Section 352.7(1), after the required public notice, the Board of Supervisors held a public hearing on this petition and received public comment.

The Board finds that the petition to create the agricultural area complies with Iowa Code Section 352.6 and that adoption of the proposed agricultural area is consistent with the purposes of Chapter 352. Therefore, on September 3, 1996, the County Board of Supervisors, on a motion made and seconded, adopts the following described agricultural area.

Property owners: Gerald & Joan Girres, Mike Girres, Norma Jean Thul, Jerald J. & Shirley B. Thilges, Thelma & Edwin Thilges, Ralph & Loretta Reding, Bernard H. Thilges, Jacob Thilges, Patricia A. & John E. Goecke
Size: 960 acres, more or less.

Legal Description attached hereto.

Description of Boundaries: Riverdale Twp. as more particularly shown on the attached map, incorporated herein by reference.

September 3, 1996

/s/ Joe Rahm
JOE RAHM, Chairman
Kossuth County
Board of Supervisors

September 3, 1996

/s/ Delores Dodds Thilges
DELORES DODDS THILGES
Kossuth County Auditor

APPENDIX E

STATUTORY PROVISIONS INVOLVED

COUNTY LAND PRESERVATION AND USE COMMISSIONS

352.1 Purpose.

It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources and fragile ecosystem of this state including forests, wetlands, rivers, streams, lakes and their shorelines, acquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use argricultural land for agricultural production, through processes that emphasize the participation of citizens and local governments.

The general assembly recognizes the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production capabilities and may ultimately undermine agriculture as a major economic activity in Iowa.

It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from nonagricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that

land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state.

352.2 Definitions.

As used in this chapter unless the context otherwise requires:

1. *"Agricultural area"* means an area meeting the qualifications of section 352.6 and designated under section 352.7.

2. *"County board"* means the county board of supervisors.

3. "*County commission*" mean the county land preservation and use commission.

4. *"Farm"* means the land, buildings, and machinery used in the commercial production of farm products.

5. *"Farmland"* means those parcels of land suitable for the production of farm products.

6. *"Farm operation"* means a condition of activity which occurs on a farm in connection with the production of farm products and includes but is not limited to the raising, harvesting, drying, or storage of crops; the care or feeding of livestock; the handling or transportation of crops or livestock; the treatment or disposal of wastes resulting from livestock; the marketing of products at roadside stands or farm markets; the creation of noise, odor, dust, or fumes; the operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor.

7. *"Farm products"* means those plants and animals and their products which are useful to people and includes

but is not limited to forages and sod crops, grains and feed crops, dairy and dairy products, poultry and poultry products, livestock, fruits, vegetables, flowers, seeds, grasses, trees, fish, honey, and other similar products, or any other plant, animal, or plant or animal product which supplies people with food, feed, fiber, or fur.

8. *"Livestock"* means the same as defined in section 267.1.

9. "*Nuisance*" means a public or private nuisance as defined either by statute, administrative rule, ordinance, or the common law.

10. *"Nuisance action or proceeding"* means an action, claim or proceeding, whether brought at law, in equity, or as an administrative proceeding, which is based on nuisance.

* * * *

352.6 Creation or expansion of agricultural areas.

An owner of farmland may submit a proposal to the county board for the creation or expansion of an agricultural area within the county. An agricultural area, at its creation, shall include at least three hundred acres of farmland; however, a smaller area may be created if the farmland is adjacent to farmland subject to an agricultural land preservation ordinance pursuant to section 335.27 or adjacent to land located within an existing agricultural area. The proposal shall include a description of the proposed area to be created or expanded, including its boundaries. The territory shall be as compact and as nearly adjacent as feasible. Land shall not be included in an agricultural area without the consent of the owner. Agricultural areas shall not exist within the corporate limits of a city. The county board may consult with the department of natural resources when creating or expanding an agricultural area contiguous to a location which is under the direct super-

vision of the department, including a state park, state preserve, state recreation area, or sovereign lake. Agricultural areas may be created in a county which has adopted zoning ordinances. Except as provided in this section, the use of the land in agricultural areas is limited to farm operations.

1. The following shall be permitted in an agricultural area:

a. Residences constructed for occupation by a person engaged in farming or in a family farm operation. Nonconforming preexisting residences may be continued in residential use.

b. Property of a telephone company, city utility as defined in Section 390.1, public utility as defined in section 476.1, or pipeline company as defined in section 479.2.

2. The county board of supervisors may permit any use not listed in subsection 1 in an agricultural area only if it finds all of the following:

a. The use is not inconsistent with the purposes set forth in section 352.1.

b. The use does not interfere seriously with farm operations within the area.

c. The use does not materially alter the stability of the overall land use pattern in the area.

352.7 Duties of county board.

1. Within thirty days of receipt of a proposal to create or expand an agricultural area which meets the statutory requirements, the county board shall provide notice of the proposal by publishing notice in a newspaper of general circulation in the county. Within forty-five days after receipt of the proposal, the county board shall hold a public hearing on the proposal.

2. Within sixty days after receipt, the county board shall adopt the proposal or any modification of the proposal it deems appropriate, unless to do so would be inconsistent with the purposes of this chapter.

352.8 Requirement that description of agricultural areas be filed with the county.

Upon the creation or expansion of an agricultural area, its description shall be filed by the county board with the county auditor and placed on record with the recording officer in the county.

352.9 Withdrawal.

At any time after three years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a request for withdrawal containing a legal description of the land to be withdrawn and a statement of the reasons for the withdrawal. The county board shall, within sixty days of receipt of the request, approve or deny the request for withdrawal. At any time after six years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a notice of withdrawal containing a legal description of the land to be withdrawn.

The board shall cause the description of that agricultural area filed with the county auditor and recording officer in the county to be modified to reflect any withdrawal. Withdrawal shall be effective on the date of recording. The agricultural area from which the land is withdrawn shall continue in existence even if smaller than three hundred acres after withdrawal.

* * * *

352.11 Incentives for agricultural land preservation—payment of costs and fees in nuisance actions.

1. *Nuisance restriction.*

a. A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date or expansion of the agricultural activities of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in section 352.9.

b. Paragraph *"a"* does not apply to a nuisance which is the result of a farm operation determined to be in violation of a federal statute or regulation or state statute or rule. Paragraph *"a"* does not apply if the nuisance results from the negligent operation of the farm or farm operation. Paragraph "*a*" does not apply to actions or proceedings arising from injury or damage to a person or property caused by the farm or a farm operation before the creation of the agricultural area. Paragraph *"a"* does not affect or defeat the right of a person to recover damages for an injury or damage sustained by the person because of the pollution or change in condition of the waters of a stream, the overflowing of the person's land, or excessive soil erosion onto another persons land, unless the injury or damage is caused by an act of God.

c. A person shall not bring an action or proceeding based on a claim of nuisance arising from a farm operation unless the person proceeds with mediation as provided in chapter 654B.

d. If a defendant is a prevailing party in an action or proceeding based on a claim of nuisance and arising from a farm operation conducted on farmland within an agricultural area, the plaintiff shall pay court costs and rea-

sonable attorney fees incurred by the defendant, if the court determines that the claim is frivolous.

2. *Water priority.* In the application of a permit to divert, store, or withdraw water and in the allocation of available water resources under a water permit system, the department of natural resources shall give priority to the use of water resources by a farm or farm operation, exclusive of irrigation, located in an agricultural area over all other uses except the competing uses of water for ordinary household purposes.

352.12 State regulation.

In order to accomplish the purposes set forth in section 352.1, a rule adopted by a state agency after July 1, 1982 which would restrict or regulate farms or farm operations may contain standards which are less restrictive for farms or farm operations inside an agricultural area than for farms or farm operations outside such an area. A rule containing such a discrimination shall not for the fact of such discrimination alone be found or held to be unreasonable, arbitrary, capricious, beyond the authority delegated to the agency, or characterized by an abuse of discretion.

APPENDIX F

State Right-to-Farm Laws
Nuisance Defenses

State	Provision Parallel To Iowa Code § 352.11
Alabama	Ala. Code § 6-5-127
Alaska	Alaska Stat. § 09.45.235
Arizona	Ariz. Rev. Stat. § 3-112
Arkansas	Ark. Code Ann. § 2-4-107
California	Cal. Civ. Code §§ 3482.5-.6
Colorado	Colo. Stat. § 35-3.5-102
Connecticut	Conn. Gen. Stat. Ann. § 19a-341
Delaware	Del. Code tit. 3, § 1401
Florida	Fla. Stat. Ann. § 823.14
Georgia	Ga. Code Ann. § 41-1-7
Hawaii	Haw. Rev. Stat. Ann. § 165-4
Idaho	Idaho Code §§ 22-4503 to -4504
Illinois	740 Ill. Comp. Stat. 70/3
Indiana	Ind. Code Ann. § 34-19-1-4
Kansas	Kan. Stat. §§ 2-3202, 47-1505
Kentucky	Ky. Rev. Stat. Ann. § 413.072
Louisiana	La. Rev. Stat. Ann. § 3:3603
Maine	Me. Rev. Stat. tit. 17, § 2805
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 5-403
Massachusetts	Mass. Gen. Laws ch. 243, § 6
Michigan	Mich. Comp. Laws § 286.473
Minnesota	Minn. Stat. Ann. § 561.19
Mississippi	Miss. Code Ann. § 95-3-29
Missouri	Mo. Rev. Stat. § 537.295

State	Provision Parallel To Iowa Code § 352.11
Montana	Mont. Code Ann. § 27-30-101
Nebraska	Neb. Rev. Stat. § 2-4403
Nevada	Nev. Rev. Stat. § 40.140
New Hampshire	N.H. Rev. Stat. Ann. §§ 432:33-:34
New Jersey	N.J. Stat. § 4:1C-10
New Mexico	N.M. Stat. Ann. § 47-9-3
New York	N.Y. Agric. & Mkts. Law § 308
North Carolina	N.C. Gen. Stat. § 106-701
North Dakota	N.D. Cent. Code § 42-04-02
Ohio	Ohio Rev. Code Ann. § 929.04
Oklahoma	Okla. Stat. Ann. tit. 2, § 9-210 Okla. Stat. Ann. tit. 50, § 1.1
Oregon	Or. Rev. Stat. §§ 30.936-.937
Pennsylvania	3 Pa. Cons. Stat. Ann. §§ 911, 954
Rhode Island	R.I. Gen. Laws § 2-23-5
South Carolina	S.C. Code § 46-45-30
South Dakota	S.D. Codified Laws §§ 21-10-25.2, -4 to -6
Tennessee	Tenn. Code Ann. §§ 43-26-103, 44-18-102
Texas	Tex. Agric. Code Ann. § 251.004-.006
Utah	Utah Code Ann. § 78-38-7
Vermont	Vt. Stat. Ann. tit. 12, § 5753
Virginia	Va. Code § 3.1-22.29
Washington	Wash. Rev. Code Ann. § 7.48.305
West Virginia	W. Va. Code § 19-19-4
Wisconsin	Wis. Stat. Ann. § 823.08
Wyoming	Wyo. Stat. §§ 11-39-102, -103, 11-44-103

Supreme Court, U.S.
FILED
JAN 11 1999
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No. 98-1003

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GERALD GIRRES, *et al.*

Petitioners,

v.

CLARENCE BORMANN, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Iowa

---

BRIEF OF RESPONDENTS BOARD OF SUPERVISORS FOR KOSSUTH COUNTY, IOWA, AND ITS MEMBERS JOE RAHM, AL DUDDING, LAUREL FANTZ, JAMES BLACK, AND DONALD MCGREGOR IN SUPPORT OF THE PETITION

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IN THE

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Respondents pursuant to S. Ct. Rule 12.6, the Board of Supervisors for Kossuth County, Iowa, together with its individual members Joe Rahm, Al Dudding, Laurel Fantz, James Black, and Donald McGregor (collectively, "Kossuth County Board of Supervisors") respectfully request that the Court grant the petition for a writ of certiorari to review the judgment of the Iowa Supreme Court in this case.

REASONS FOR GRANTING THE WRIT

The Kossuth County Board of Supervisors supports the petition for certiorari filed in this case and joins

petitioners in urging this Court to grant review. The decision of the Iowa Supreme Court holding the Iowa right to farm law unconstitutional on its face as a *per se* taking in violation of the Fifth Amendment to the United States Constitution is, as explained in the petition, in conflict with the decisions of this Court and lower court decisions from around the country. Unless this Court grants review, the constitutionality of the right to farm laws in the other 49 states will be cast in doubt. This Court should grant review so that the legislative policy determination in Iowa and the other 49 states that land use should be regulated in such a manner as to preserve threatened agricultural farmland is not overturned by an erroneous interpretation of federal constitutional principles.

Additionally, the Kossuth County Board of Supervisors argues that its actions in this matter have been in accordance with law.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, this Court should grant the petition.

Respectfully submitted,

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* Counsel of Record

Counsel for Board of Supervisors for Kossuth County, Iowa and its Members

MOTI FILED
JAN 2 1 1999

(3)

No. 98-1003

IN THE
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GERALD GIRRES, *et al.*,
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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

MOTION FOR LEAVE TO FILE BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL PORK PRODUCERS COUNCIL, IOWA FARM BUREAU FEDERATION, COLORADO FARM BUREAU, FLORIDA FARM BUREAU FEDERATION, INDIANA FARM BUREAU, INC., KANSAS FARM BUREAU,

(Additional *Amici Curiae* Listed on Inside Cover)

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29pp

MINNESOTA FARM BUREAU FEDERATION, MISSOURI FARM BUREAU FEDERATION, NEBRASKA FARM BUREAU FEDERATION, NEW MEXICO FARM & LIVESTOCK BUREAU, OHIO FARM BUREAU FEDERATION, INC., PENNSYLVANIA FARM BUREAU, TENNESSEE FARM BUREAU FEDERATION, TEXAS FARM BUREAU, UTAH FARM BUREAU FEDERATION, IOWA POULTRY ASSOCIATION, OHIO POULTRY ASSOCIATION, NEBRASKA POULTRY INDUSTRIES, INC., SOUTH DAKOTA POULTRY INDUSTRIES ASSOCIATION, IOWA AGRIBUSINESS ASSOCIATION, IOWA CORN GROWERS ASSOCIATION, IOWA CATTLEMEN'S ASSOCIATION, IOWA DAIRY PRODUCTS ASSOCIATION, IOWA INSTITUTE FOR COOPERATIVES, IOWA PORK PRODUCERS ASSOCIATION, IOWA SOYBEAN ASSOCIATION, AND IOWA TURKEY FEDERATION IN SUPPORT OF THE PETITION

IN THE

Supreme Court of the United States

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No. 98-1003

GERALD GIRRES, *et al.*,

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CLARENCE BORMANN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

---

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE NATIONAL PORK PRODUCERS COUNCIL, IOWA FARM BUREAU FEDERATION, COLORADO FARM BUREAU, FLORIDA FARM BUREAU FEDERATION, INDIANA FARM BUREAU, INC., AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of the Petition. Petitioners have consented to the filing of this brief and their letter has been filed with the Clerk. Respondents have not consented, necessitating this Motion.

All 50 States have statutes that provide a qualified defense to nuisance liability that may arise from agricultural operations. Known as "right-to-farm" laws, these statutes

have been enacted by the state legislatures to encourage farming and decrease the rate at which land available for agricultural uses is diminishing. In this case, the Iowa Supreme Court has held that the mere enactment of such a qualified nuisance defense is sufficient to constitute a *per se* taking under the Fifth and Fourteenth Amendments. Under the Iowa court's reasoning, the right-to-farm laws of all 50 States stand to be invalidated.

Amici are national and state-wide associations representing agricultural producers who rely on and benefit from right-to-farm laws and who are therefore vitally interested in the question presented by the Petition. Unless the Petition is granted and the decision of the Iowa court is corrected, *amici's* members in Iowa who have established "agricultural areas," committing their lands to agricultural use, will lose the limited nuisance defense that was the *quid pro quo* for so dedicating their property. They therefore face the immediate prospect of increased nuisance litigation and potential liability.

Beyond Iowa, *amici's* members nationwide also face immediate uncertainty over the validity and permanence of the statutory qualified nuisance defenses upon which they have relied for years. Regardless of whether the Iowa court's reasoning is followed by other courts, unless that court's decision is corrected, a wave of Fifth Amendment challenges to right-to-farm laws (and potentially to other land use restrictions implicated by the reasoning of the court) is certain to come. This impending litigation alone undermines the relative stability and security from nuisance suits that right-to-farm laws have provided American agriculture for most of the past two decades.

The Petition presents strong arguments as to the importance of the constitutional question presented here and the inconsistency between the Iowa court's decision and this Court's Fifth Amendment jurisprudence. *Amici* wish to

supplement these arguments (¶ 1), but also to emphasize: the far-reaching implications of the decision below for numerous other relatively modest land use restrictions beyond right-to-farm laws (¶ 2); the improvidence of establishing a new category of *per se* takings that would exclude any consideration of the legislature's purposes in the context of Fifth Amendment challenges to land use restrictions (¶ 3); the need to correct the Iowa court's departure from this Court's high standard for facial challenges (¶ 4); and the importance of granting certiorari to protect laws enacted by 50 state legislatures in the battle to preserve America's farmland (¶ 5).

Respectfully submitted,

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January 21, 1999

QUESTION PRESENTED

Are "right-to-farm" laws — enacted by all 50 States — facially unconstitutional as a *per se* taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution?

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AMICUS CURIAE BRIEF OF THE NATIONAL PORK PRODUCERS COUNCIL, IOWA FARM BUREAU FEDERATION, COLORADO FARM BUREAU, FLORIDA FARM BUREAU FEDERATION, INDIANA FARM BUREAU, INC., KANSAS FARM BUREAU, MINNESOTA FARM BUREAU FEDERATION, MISSOURI FARM BUREAU FEDERATION, NEBRASKA FARM BUREAU FEDERATION, NEW MEXICO FARM & LIVESTOCK BUREAU, OHIO FARM BUREAU FEDERATION, INC., PENNSYLVANIA FARM BUREAU, TENNESSEE FARM BUREAU FEDERATION, TEXAS FARM BUREAU, UTAH FARM BUREAU FEDERATION, IOWA POULTRY ASSOCIATION, OHIO POULTRY ASSOCIATION, NEBRASKA POULTRY INDUSTRIES, INC., SOUTH DAKOTA POULTRY INDUSTRIES ASSOCIATION, IOWA AGRIBUSINESS ASSOCIATION, IOWA CORN GROWERS ASSOCIATION, IOWA CATTLEMEN'S ASSOCIATION, IOWA DAIRY PRODUCTS ASSOCIATION, IOWA INSTITUTE FOR COOPERATIVES, IOWA SOYBEAN ASSOCIATION, AND IOWA TURKEY FEDERATION IN SUPPORT OF THE PETITION

INTEREST OF *AMICI CURIAE*[*]

The interest of *amici curiae* in this matter is detailed in the preceding Motion for Leave to File Brief *Amicus Curiae* and, in the interest of reducing the burden on the Court, will not be restated but is incorporated herein.

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[*] Pursuant to Rule 37.6, counsel of record states that no part of this brief has been authored by counsel for either party. In addition, no one other than *amici*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Amici adopt Petitioners' statement of the case, adding the following points of emphasis.

1. In contrast to the vast majority of land use laws and regulations in today's regulatory state, the 50 "right-to-farm" statutes that would be invalidated under the reasoning of the Iowa Supreme Court do not restrict the uses to be made of private property. Rather, these laws protect the ability of farmers to use their land for agricultural production by providing a qualified defense to nuisance liability for normal farming activities. Fifty state legislatures have seen fit to provide this limited nuisance liability protection in order to decelerate the loss of this nation's irreplaceable agricultural land base, and to provide a measure of certainty where lawful but sometimes incompatible land uses — such as agriculture and residential development — collide. The Iowa Supreme Court's decision ignored this legitimate determination, made independently by each of the 50 States. Indeed, by declaring Iowa's law facially invalid as a *per se* physical taking of property under the Fifth and Fourteenth Amendments, the Iowa court put any examination of the legislative policy off limits. Importantly, the Iowa court reached this result based on a misapprehension of several older rulings of this Court, while disregarding this Court's modern takings jurisprudence.

2. The Iowa statute declared invalid in this case provides owners of designated "agricultural areas" with a qualified defense to nuisance suits by their neighbors. Agricultural areas are designated as such upon application of the land owners and approval by a county Board of Supervisors after notice and a public hearing. Iowa Code § 352.6. Agricultural areas may not be designated within the corporate limits of a city, must encompass at least 300 acres,

and must be restricted to predominantly agricultural use. *Id.* In exchange for so limiting the use of their lands, the owners of agricultural areas receive the qualified nuisance defense. [1]

3. Iowa's nuisance defense is carefully limited. It is *not* available if a nuisance results from a farm operation that violates *any* federal or state statute or regulation. Iowa Code § 352.11(1)(b). It is *not* available if a nuisance results from the negligent operation of a farm. *Id.* It does *not* apply where the injury or damage was caused by a farm operation before the designation of the agricultural area, or where the injury or damage is caused by the pollution of any stream, the overflowing of another's land, or excessive soil erosion onto another's land. *Id.* Perhaps most importantly, for purposes of considering the Iowa court's decision, the defense does *not* apply to claims for trespass. The statute therefore does *not* authorize or legitimize the physical invasion or occupation of any third party's land.

4. Respondents are Petitioners' neighbors, who claim that the designation of Petitioners' land as an "agricultural area" constitutes a *per se* "physical" taking of Respondents' property under the Fifth and Fourteenth Amendments. Respondents argued below that the statutory nuisance defense creates an "easement" that affects their land by enabling Petitioners to engage in farming operations that might otherwise be considered a nuisance to neighbors such as Respondents. Respondents have *not* alleged that any nuisance exists on Petitioners' property, have *not* alleged any impact on the use and enjoyment of their land, and have *not*

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[1] Owners may apply to withdraw their land from an agricultural area after 3 years, and may withdraw the land upon notice to the county board after 6 years. Iowa Code § 352.9.

alleged any diminution of the value of their land. Therefore the only issue before the court below was whether the mere designation of an agricultural area — in the absence of any actual nuisance — violates the Fifth and Fourteenth Amendments.[2] The court concluded that it did.

REASONS FOR GRANTING THE WRIT

The Iowa court's novel and expansive view of the category of *per se* physical takings of property should be corrected. The court's decision would deprive more than 100,000 farms in Iowa, comprising the State's leading industry, of a critically important legislatively created protection — the assurance that, if they operate in a lawful and non-negligent manner, they will not risk being put out of business simply because they look and sound and smell like farms. The decision also calls into question 49 other state statutes, enacted with the same important legislative goals of preserving farmland and resolving land use conflicts, and will foster litigation in 49 States until this Court resolves the constitutional issue. The Iowa court's new definition of *per se* physical takings does nothing less than eliminate all consideration of these legislative purposes in favor of a "bright line" that is drawn far beyond any reasonable conception of the "physical" taking of property.

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[2] Respondents alleged that the county board's designation of the agricultural area was the act that effected a taking of their property, but presented a challenge to Iowa Code Section 352.11 (the qualified nuisance defense) in its entirety. The Iowa court agreed that the area designation was the act that accomplished a taking, because it "triggered" the nuisance defense of Section 352.11. *See* App. 23a-24a. The court declared Section 352.11 facially invalid, rather than declaring the area designation invalid, presumably because Section 352.11 is "triggered" every time an agricultural area is designated.

As we demonstrate below, this Court should grant certiorari to resolve a substantial conflict between the Iowa court's decision and this Court's Fifth Amendment takings jurisprudence. During the past two decades, in particular, this Court has taken great care to limit and clarify the categories of *per se* takings, so that all but the clearest cases would be subject to detailed factual inquiry. The Iowa court's decision would dramatically expand those categories by making any restriction that can be deemed an "easement" — regardless of whether it authorizes any physical entry onto property — a *per se* taking. That decision, if allowed to stand, would adversely affect hundreds of thousands of our nation's farmers and, potentially, millions of other Americans who are subject to land use regulation. It would override the legislative judgment of all of our States. And it would do so on the basis of a facial challenge, uninformed by any evidence regarding the Iowa statute's ability to accommodate whatever complaint Respondents might have had or whatever injury, if any, Respondents might have suffered.

1. The writ should be granted because the Iowa Supreme Court has resolved important issues of federal constitutional law in a way that conflicts with this Court's precedents. *See* S. Ct. Rule 10(c); Pet . at 7-8, 26. More particularly, the Iowa court's expansive view of the category of physical takings that *per se* violate the Fifth Amendment contradicts this Court's decisions in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992), and other cases concerning "physical" takings of property. *See* Pet. at 15-24.

Under the analysis of the Iowa court, any government action establishing a restriction or right that can be characterized as an "easement" will be deemed a *per se* "physical" taking — regardless of whether that "easement"

authorizes actual physical entry upon the property of the claimant. The court reasoned that an "easement" was created by the Iowa right-to-farm law's limited nuisance defense, because the defense enables farming operations to engage in activities on their own land that might otherwise constitute nontrespassory nuisances enjoinable by neighboring landowners such as Respondents. Thus, according to the court's analysis, a "physical" *per se* taking resulted from the creation of a right to maintain an admittedly "*nontrespassory invasion*[]" of property. App. 16a.

There is good reason to doubt that the statutory modification of common law nuisance defenses at issue here constitutes an "easement." Even if it does, however, there is nothing in this Court's precedents that supports the Iowa court's determination that *nonphysical* "easements" – merely by reason of being labeled easements – are *physical per se* takings. Simply put, no "physical" taking is accomplished by the Iowa statute because no "physical" entry upon property has occurred or been authorized.

The "easement" that the Iowa court deemed to exist consists of the "right" of Respondents' neighboring landowners to conduct lawful, non-negligent, non-trespassory farming operations, which — by the very nature of farming — may create noises or odors that could rise to the level of a common law nuisance. In order to encourage farming, the statute eliminates tort liability for the normal and natural consequences of such farming operations. It does not authorize physical entry onto Respondents' property. Thus, even if the creation of a limited nuisance defense could properly be deemed an "easement," it would not satisfy this Court's understanding of a physical taking. *Cf. Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987) (taking occurs when government requires an

uncompensated "classic right-of-way easement" allowing individuals "a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed").[3]

In contrast to the Iowa statute's creation of a narrow limitation on Respondents' potential future nontrespassory nuisance claims, a *per se* physical taking as defined by this Court involves physical entry onto property. Thus, in *Loretto*, 458 U.S. at 438, the *per se* physical taking involved a New York law that had authorized the "direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." *See also Nollan*, 483 U.S. at 832 (right-of-way easement allowing continuous passage over real property).

Indeed, in *Yee*, 503 U.S. at 519, the Court rebuffed a strikingly similar attempt by property owners to characterize the regulation of their property's use as a "physical" *per se* taking. In that case, a group of landlords alleged that the combined effect of a city ordinance and a California statute was to transfer from the landlords to certain tenants "a discrete interest in land — the right to occupy the [landlord's] land indefinitely at a submarket rent." *Id.* at 527. This Court rejected the landlords' characterization of the "interest in land" taken from them as a "physical" taking, instead holding that "the state and local laws at issue here merely regulate petitioners' *use* of their land by regulating

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[3] *Nollan* thus does not support the Iowa court's decision, although it is the single post-1960s decision of this Court cited in support of the Iowa court's "nontrespassory" physical invasion theory. *See* App. 15a-19a.

the relationship between landlord and tenant." *Id.* at 528 (emphasis in original).[4]

Acknowledging that the regulation of land use can benefit some people at the expense of others, the Court noted that "[t]raditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise." 503 U.S. at 529-30. Such incidental economic effects, however, "do[] not convert regulation into physical invasion." *Id.* The Iowa statute presents no occasion to alter that principle.[5]

As the Petition recites (at 19-20), the Iowa court reached its decision based on a misapprehension of several older decisions of this Court. Three of those decisions involved physical intrusions into the "immediate reaches" directly

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[4] Lower federal courts also have rejected attempts to equate regulatory restrictions with physical takings. *See, e.g., Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (rejecting contention that mandatory transfer of funds amounts to physical taking of money); *Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 761 F. Supp. 1528, 1559 (M.D. Fla. 1991) (law prohibiting housing discrimination on basis of familial status did not amount to physical taking by affecting plaintiffs' "right to exclude" children from their age-restricted communities); *Gibbs v. Southeastern Inv. Corp.*, 705 F. Supp. 738, 742-44 (D. Conn. 1989) (legislation allowing eviction of tenants only for cause does not authorize "permanent physical occupation"); *ABN 51st St. Partners v. City of New York*, 724 F. Supp. 1142, 1153 (S.D.N.Y. 1989) (ordinance forcing choice between refraining from renovations on property or reserving 28 percent of floor space for low income tenants is not physical *per se* taking).

[5] Respondents, of course, have not alleged any current economic or other injury, relying exclusively on the physical taking theory.

above private property, over which the landowner was deemed to have exclusive control. *United States v. Causby*, 328 U.S. 256, 264 (1946); *Griggs v. Allegheny County*, 369 U.S. 84, 88-89 (1962); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329 (1922). The cases thus concern "physical" takings in a very real sense, in that private airspace was physically invaded.[6] They do not support expansion of the *per se* physical category to include "non-physical" invasions.

The remaining decisions of this Court relied on by the Iowa court are also inapposite. Citing a 32-year old law review article, the Iowa court concluded that an 85-year old decision of this Court, *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), "entirely does away with the requirement of a physical taking or touching." App. 19a (quoting William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L. Rev. 207, 220 (1967)). That may well be true as to takings generally; however, *Richards* was not decided as a "physical" takings case.[7] Nor was *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), which, despite the Iowa court's reliance on it, is generally viewed as this Court's first explicit recognition that a "mere use restriction ... *in the absence of physical occupation* or appropriation" can amount to a Fifth Amendment taking. Robert Meltz, *et al.*, *The Takings Issue: Constitutional Limits on Land Use Control*

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[6] These decisions also involved, however, activity so disruptive that it had rendered private property essentially uninhabitable; so the cases could be deemed *per se* takings today either as physical takings or as "deprivation of economically viable use." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[7] Instead, the taking found in *Richards* involved deprivation of use and depreciation in the value of property. 233 U.S. at 556.

and Environmental Regulation (Island Press 1999) at 15 (emphasis added).

Disregarding the requirement in this Court's modern Fifth Amendment jurisprudence that *per se* physical takings involve *physical* invasions — indeed, without citation to two post-*Loretto* decisions emphasizing the narrow nature of the category of *per se* physical takings, *Yee*, 503 U.S. at 529-30, and *Federal Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245 (1987) — the Iowa court has drastically expanded the *per se* taking category to invalidate any government action that can be said to establish a non-physical "easement" affecting property without compensation. The court's novel analysis is squarely in conflict with this Court's precedents and should be corrected.

2. The Iowa court's decision should also be reviewed because the new category of *per se* takings that it creates has no stopping point. Under the court's construct, the limited nuisance defense "creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement)," and an easement is a constitutionally protected property interest that constitutes a *per se* taking of the "physical invasion" category. App. 13a-15a, 24a. An "easement" thus exists, according to the court, whenever property is burdened for the benefit of someone other than the owner of the property. *See* App. 12a-13a.

This Court long ago recognized that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal,* 260 U.S. at 413. Accordingly, a "taking" is not readily found just because "interference [with property] arises from some public program adjusting the benefits and burdens of

economic life to promote the common good." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Not surprisingly, therefore, this Court has upheld the constitutionality of any number of laws that "interfere with property" in the public interest, including, for example, municipal zoning ordinances. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Yet there can be no question that zoning, by its nature and to achieve its purposes, burdens some property for the benefit of others, and thus may be said to establish "easements" under the Iowa court's analysis.[8]

It may well be correct, in some broad and metaphysical sense, to characterize every burden on property for the benefit of another as an "easement." But the consequence of such a characterization cannot be, in our modern regulatory state, to make each such burden a *per se* physical taking. That simply goes too far and would create a combination of economic burden and regulatory paralysis beyond the nation's ability to accommodate or manage. The right-to-farm laws that substantially replicate Iowa's law thus would only be the first wave of casualties. This Court should

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[8] Thus, either of two absurd results is driven by the reasoning of the Iowa court. First, zoning and other moderate land use restrictions, which have traditionally been upheld as appropriate adjustments of property rights that do not rise to the level of Fifth Amendment takings, now may be deemed facially invalid as "physical" takings of "easements." Alternatively, if zoning restrictions were deemed somehow different, legislatures seeking to protect agricultural land uses might choose to zone areas exclusively for agricultural use, thereby prohibiting all non-farm residences, to achieve their objectives without incurring takings liability. The perverse result, of course, would be the use of a *more* restrictive measure than the qualified nuisance defense.

exercise its discretion to consider and correct the Iowa court's decision.

3. Nor should this Court allow the Iowa decision to serve as precedent for eliminating from the takings analysis any consideration of the legitimacy of the legislature's purpose. The Iowa court simply assumed, with no evidence whatever, that (a) Respondents would be burdened if they could not sue their neighbors for the "nuisance" aspects of lawful, non-negligent and non-trespassory farming, and that (b) such burden, as an "easement," is a *per se* compensable taking — even though that "burden" may do no more than preserve the nature of the community in which the parties live.

Yet, one expects farming in a farming community. As this Court has recognized, zoning laws — like nuisances — are not absolute, but must be evaluated in context. Thus,

> the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like *the question whether a particular thing is a nuisance, is to be determined*, not by an abstract consideration of the building or of the thing considered apart, but *by considering it in connection with the circumstances and the locality. . . . . A nuisance may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard.*

Village of Euclid, 272 U.S. at 388 (emphasis added). The Iowa statute that was invalidated below merely sought to preserve the State's agricultural base, by declaring that lawful, non-negligent, and non-trespassory farming — in Iowa, and subject to the requirements for establishing an agricultural area — is *not* a nuisance. This is no more

surprising and no less lawful than ordinances that prohibit maintaining farm animals in urban areas.

The Iowa court's decision puts these principles at risk, even though this Court has held that a "state does not exceed its constitutional powers for deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (denying a "taking" claim for the value of trees ordered cut down by a state entomologist, acting under state law, to prevent infection in those trees from spreading to nearby apple orchards, in a State where the apple industry was of great importance). The agrarian zoning effected by the Iowa legislature in providing the limited nuisance defense was a proper exercise of its legislative power, in that it merely defined where pigs in the barnyard prevail over the "parlors" of rural neighbors and encroaching development.

Review and correction of the Iowa court's decision is important to preserve the courts' responsibility in the land use regulation context to balance the state interests served by legislation against the burden imposed. It is important, as well, to safeguard against the possible chilling effect that the Iowa decision may have on state legislatures by causing them to fear the effect on their coffers of this sort of sound and well-intentioned legislative determination.

4. The Iowa court's variance from the teachings of this Court as to the standard for facial challenges should be corrected. The court acknowledged that it considered the case as a facial challenge to the Iowa statute and that Respondents "presented neither allegations nor proof of nuisance." App. 5a-6a. The Petition advances strong arguments (at 8-14) why the case was premature and should not have been decided in the absence of a concrete factual

setting. *Amici* share Petitioners' concerns about the lack of any evidentiary record and offer an additional reason why the Iowa court's treatment — in the face of that record — warrants review by this Court.

Not very long ago, this Court had occasion to observe that "'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an 'uphill battle'" because they must show that "mere enactment" effects a taking. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997). *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) (petitioners "face an uphill battle in making a facial attack on the Act as a taking"). *Amici* believe that the Iowa court should have rejected Respondents' facial challenge on its merits, because neither the "mere enactment" of the Iowa right-to-farm law nor the "mere designation" of an agricultural area near Respondents' land authorized a physical invasion or occupation of Respondents' or anyone else's property. Since Respondents made no attempt to argue that the statute fails to "advance legitimate state interests" or denies Respondents "economically viable use" of their land, so as to otherwise constitute a taking, *see Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), their challenge to the Iowa statute should have been rejected.[9]

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[9] If Respondents had alleged denial of the use of their property as a result of the potential nuisance defense, then that claim would likely be premature in the context of a facial challenge. It would be impossible to know the full impact on Respondents' use of their land in advance of any actual nuisance occurring, or any attempt by Petitioners to assert the defense. *See Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., dissenting) (noting even greater difficulty of establishing denial of economically viable use in facial challenge); Robert Meltz, *et al.*, *The Takings Issue: Constitutional*

(continued....)

The Iowa case well illustrates the need for the "uphill battle" standard that this Court requires for facial challenges. In the posture in which it considered the case, the Iowa court did not know what nuisance, if any, was actually being visited upon the Respondents, or what impact that hypothetical nuisance was having on the Respondents' use and enjoyment of their land. The court could not evaluate whether and to what extent that hypothetical nuisance was the result of negligence, or some noncompliance with any one of the myriad federal and state laws that regulate land use, air quality, water quality, dust, noise, and odor. Those are important considerations, for if the hypothetical nuisance *did* result from any of those factors, or if it involved water pollution or flooding or some other excluded event, the Respondents' suit for their hypothetical nuisance was not barred by the Iowa statute. In short, the Iowa court was not in a position, on the record before it, to evaluate how great was the restriction on the Respondents' ability to sue, or indeed whether any real world restriction even existed. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995) (successful facial challenge to a regulation requires showing that the regulation cannot operate properly in any circumstance.)

Without any record, this case is in no respect like the cases that the Iowa court relied on to reach its decision. *See, e.g., Nollan*, 483 U.S. at 832 ("individuals are given a permanent and continuous right to pass to and fro so that the

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(continued) . . .

Limits on Land Use Control and Environmental Regulation (Island Press 1999) (noting extreme difficulty of establishing economic injury in facial challenge, whereas other grounds requiring less factual development may be provable "on the face of the law").

real property may continuously be traversed); *Causby*, 328 U.S. at 259 (the "result [of the low overflights] was the destruction of the use of the property as a commercial chicken farm. . . . On the basis of these facts, [the Court of Claims] found that respondents' property had depreciated in value"); *Richards*, 233 U.S. at 549 (finding numerous and specific kinds of damage to plaintiff's house, which caused it to depreciate in value and become unrentable). Nor was it the kind of permanent physical occupation case that this Court finds appropriate to the *per se* takings category – a case which "presents relatively few problems of proof" because the "placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Loretto*, 458 U.S. at 419.

As a facial challenge effectively made to the "mere enactment" of the Iowa statute, Respondent's case encountered an "especially steep" hill, *Keystone*, 480 U.S. at 495, and should have been rejected on its merits. The Iowa decision's encroachment on this Court's standard for considering facial challenges should be addressed by this Court, particularly in view of the potentially far-reaching impact that the decision will otherwise have.

5. The writ should be granted, finally, because the Iowa court's decision threatens to undermine the sound and consistent policy of our national government and all 50 of our state governments. Iowa's right-to-farm law, like similar statutes in the other 49 States, was enacted in recognition of "the importance of preserving the state's finite supply of agricultural land" and to stem the "[c]onversion of farmland to urban development, and other nonfarm uses." Iowa Code § 352.1. The statute therefore provides "local citizens and local governments [with] the means by which agricultural land may be protected from nonagricultural development

pressures." *Id.* In view of the friction that can develop between agricultural operations and their residential neighbors over noise, odor, and other normal incidents of farming, a primary means of protecting agricultural lands is the provision of a qualified nuisance defense for lands committed to "agricultural areas." *Id.* § 352.11.

The need to preserve America's farmland has received increased attention from Congress and from state and local lawmakers since the late 1970s. *See, e.g., Preserving America's Farmland — a Goal the Federal Government Should Support*, Report to the Congress by the Comptroller General of the United States (Sept. 20, 1979) ("Report to Congress"); National Agricultural Lands Study, Final Report (jointly sponsored by the United States Department of Agriculture and the President's Council on Environmental Quality, 1981) ("NALS Report"). The realization that millions of acres of prime farmland were being lost to other uses each year, and that this vital resource is essentially non-renewable (since acres converted to development rarely can return to farm use), [10] spurred legislatures nationwide to enact "right-to-farm" laws that, like the Iowa statute, encourage the agricultural use of land by providing a measure of protection from nuisance suits.

The statutory limitation of nuisance suits preserves farmland by protecting farms and farmers from the cost and economic uncertainty that comes with litigation and the threat of litigation over the normal incidents of farm life. As explained by one state legislature:

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[10] *See* Report to Congress at 5 (estimating 3 to 5 million acres of U.S. farmlands are converted for urban or other uses each year, and noting that farmland converted to more intensive uses will not likely be farmed again).

> When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this [law] to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

N.C. Gen. Stat. § 106-700. *See also* Jacqueline P. Hand, *Right-To-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. Pitt. L. Rev. 289, 305 (1984) ("In enacting the right-to-farm laws, the various state legislatures have made the policy judgment that the social benefits of retaining land in agriculture are so critical that, rather than allowing courts to decide on a case-by-case basis whether an agricultural use is reasonable, the balance between agriculture and other uses should always be tipped toward agriculture").

The "burden" of providing farmers with a measure of certainty concerning the activities that can subject them to nuisance liability necessarily falls on neighboring landowners who are would-be nuisance plaintiffs. Iowa's statute minimizes that burden by excluding from protection farming activities that are unlawful or negligent, as well as injuries caused prior to the designation of the agricultural area or by pollution, overflowing of land, or excessive soil erosion. *See* Iowa Code § 352.11(1)(b). Other right-to-farm laws include similar exceptions to ensure that only lawful, non-negligent, and responsible farming operations are protected from nuisance suits, thus minimizing the intrusion upon neighboring landowners.

Right-to-farm laws such as Iowa's thus reflect the state legislatures' careful balancing of benefits and burdens within a society facing increasing tensions between the need to maintain agricultural land uses and the pressures of a growing population demanding shopping malls, golf courses, and peaceful home-sites in the "country."[11] These statutes are in this way indistinguishable from innumerable other land use restrictions, which, when challenged as uncompensated takings, plainly call for "essentially ad hoc, factual inquiries" into the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (citing *Penn Central*, 438 U.S. at 124). Unlike cases involving such other land use restrictions, however, that factual inquiry was foreclosed here by the Iowa court's ill-conceived and indefinite expansion of the category of *per se* physical takings.

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[11] *See* NALS Report at 10-11 (describing rapid expansion of residential development in rural areas and demographic and economic pressures leading to conversion of land from agricultural use, including "[t]ensions between farming and nonfarming people ... in rural areas with growing populations" with causes ranging from vandalism of crops and farm equipment to disagreements over taxes for services demanded by new residents).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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